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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1611

WALTER METZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit.

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Petition for a Writ of Certiorari
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Walter Metz petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this case on December 10, 1979, and February 14, 1980.

Introductory Statement.

This case raises, *inter alia*, important questions concerning the fundamental constitutional right of an innocent defendant

to present his substantive defense to the jury where the defense hinges on exculpatory evidence possessed by two co-defendants (one of whom was being tried jointly with petitioner and one of whom had previously entered a plea of guilty).

By denying petitioner's motion for severance from his co-defendant despite that co-defendant's willingness to testify at a separate trial and despite a specific showing of the exculpatory nature and express need for the testimony to be proffered, and by refusing to permit proper limitation of a former co-defendant's unequivocally proffered exculpatory testimony, thereby leading to an improperly accepted blanket invocation of the Fifth Amendment, the courts below denied petitioner — charged with conspiracy — the opportunity to present his substantive defense of nonparticipation through the testimony of two witnesses who were in the best position to vindicate his rights — two individuals who would admit their own participation in the events resulting in the indictment and testify that petitioner had not been involved.

In excluding the testimony of these two key witnesses the courts below failed to give adequate consideration to petitioner's fundamental Sixth Amendment right to present witnesses on his own behalf and employed inadequate standards of review in assessing the impact of the exclusion. Thus, this case presents this Court with an opportunity to provide guidance as to the proper scope of the Sixth Amendment and its interplay with other rights and governmental interests, and to establish, for the first time, authoritative guidelines and standards for the lower courts to apply in determining whether severance is necessary to effectuate a defendant's fundamental Sixth Amendment right.

Proceedings Below.

Following a jury trial in the United States District Court for the Northern District of Texas (Porter, J.), petitioner Walter Metz was convicted of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. He was sentenced to a twelve year term of imprisonment and a special parole term of three years.

Petitioner appealed from the judgment of District Court entered on September 22, 1978. His conviction was affirmed by the United States Court of Appeals for the Fifth Circuit on December 10, 1979. The opinion of the Court of Appeals is reported at 608 F. 2d 147, and is reproduced in the Appendix at pp. 1a-22a. Petitions for rehearing and rehearing en banc were denied on February 14, 1980. Petitioner's motion for severance was denied by the District Court. The motion and order of denial are reproduced in the Appendix at pp. 24a-31a.

Jurisdiction.

The original judgment of the Court of Appeals was entered on December 10, 1979. Petitions for rehearing and rehearing en banc were denied on February 14, 1980. The time for filing a petition for a writ of certiorari was enlarged to April 14, 1980, by Mr. Justice Powell (A. 23a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

I. Whether the denial of an opportunity to present a substantive defense hinging on exculpatory evidence possessed by

two co-defendants — effected by the denial of a motion for severance from a co-defendant being tried jointly with petitioner and the allowance of the blanket invocation of the Fifth Amendment by a former co-defendant who was willing to testify concerning limited, but critical, matters — abrogated petitioner's Sixth and Fifth Amendment rights to present witnesses on his own behalf and to a fair trial?

II. Whether the decision below, justifying a warrantless entry into petitioner's home on the basis of exigent circumstances, was erroneous, based on improper standards of review, and in conflict with the decision of the court in *United States* v. *Robertson*, 606 F. 2d 853 (9th Cir. 1979)?

Constitutional Provisions and Federal Rules Involved.

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .."

Rule 14 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . ."

Rule 804(b)(3) of the Federal Rules of Evidence provides, in pertinent part:

> "(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . . . .
>
> "(3) **Statement against interest.** A statement which . . . at the time of its making . . . so far tended to subject him [the declarant] to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Statement of the Case.

Petitioner Walter Metz was convicted of conspiracy to possess with intent to distribute cocaine. According to the testimony of the government witnesses, a large scale cocaine transaction was first discussed by undercover DEA agents, and other individuals — not including petitioner — in August, 1977 (A. 3a). Following some intermediate events, again not involving petitioner, an agreement was reached by DEA agents and co-defendant Oldham in Dallas, Texas, on December 11, 1977, for the purchase by the agents of forty pounds of cocaine for $850,000. Petitioner was neither present at any meetings nor mentioned by Oldham. The transaction was to occur in Florida (A. 3a). From December 12 to December 14, 1977, a number of agents and co-defendants met at various places in and around Miami, Florida. During these meetings, the agents saw only one pound of cocaine. Petitioner never met with any agents and his name was not mentioned to any agents (A. 3a-5a). A number of individuals, including petitioner, were arrested on December 14, 1977, when it appeared that the large scale transaction would not occur (A. 5a).

The evidence against Metz consisted of testimony of surveilling agents that on December 14, 1977, after leaving meetings with DEA agents at which promises to obtain the cocaine transacted for were made, one co-defendant was observed at Metz' house three times and three other co-defendants were observed there one of those times. Metz was observed there by one agent at one of those times. The government also introduced a small amount of cocaine found in Metz' home (A. 4a, 6a).[1]

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[1]Specifically, after an inspection of the $850,000 at the Opa Locka Airport, co-defendants Schiller and Ruggiero left, purportedly to obtain the cocaine. After stopping at Ruggiero's home Schiller, alone, drove to Metz'

Petitioner moved for a severance to enable him to call his co-defendant, Ronald Schiller, as a witness to testify on his behalf and provide exculpatory evidence critical to the establishment of Metz' substantive defense of nonparticipation. In his motion he stated that Schiller would testify that he (Schiller) was involved with co-defendants Ruggiero and Bland in a cocaine transaction and had had contacts with the undercover agents, but that he had no contact of any kind with petitioner on December 13-14 and that Metz was not involved in any cocaine transaction with him, was not referred to by him or others during their contacts with government agents or among them-

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house where he stayed from approximately 12:45-3 P.M. Metz was not observed at his house. Schiller then picked up Ruggiero and met the agents at another motel. He had only one pound of cocaine which the agents rejected, insisting on production of the full forty pounds (A. 3a-4a). Promising to get at least five pounds, Schiller left with Bland, Ruggiero, and Ruggiero's son and drove to petitioner's house, staying for approximately 15 minutes, and then going to Ruggiero's home. One agent testified at trial that he observed Metz at the door of his townhouse (A. 4a). However, that same agent had failed to identify Metz as being at the door at a pretrial hearing on petitioner's motion to suppress (A. 18a). Schiller later returned to Metz' house alone, remaining there for approximately one hour. Metz was not observed at that time. Ruggiero, her son, Schiller and Bland were arrested at approximately 8:30 P.M., after they had failed to produce any more cocaine and it became apparent to the agents that they would be unable to do so (A. 4a-5a).

Metz' house, suspected of being the stash pad because of the visits of his co-defendants, was placed under surveillance. At approximately 10:30 P.M., a woman, later identified as petitioner's wife, left the townhouse in an automobile. She was followed and stopped and she and the vehicle were searched. No contraband was found. She was then detained and questioned at length and a decision to "secure" the residence while awaiting a search warrant was made. After midnight the officers entered the house with Mrs. Metz. Petitioner and Mrs. Metz' brother were inside. Some forty minutes after the initial entry a "small lump" of cocaine was observed on the kitchen floor and seized. Pursuant to a search warrant, issued at 3:30 A.M., and executed at 7 A.M., the officers seized a total of 2.1 grams of cocaine from the house (A. 5a-6a).

selves, and had not conspired with him to possess or distribute cocaine (A. 25a-26a). The motion further stated that Schiller would testify concerning his visits to the Metz residence and its use by him on December 14, 1977, and "how" and "why" contraband was later found there (A. 25a-26a). Moreover, he would testify that petitioner was not involved in and was unaware of any possession of contraband there (A. 26a).

Finally, the motion stated that Schiller would not testify at his own trial, and if called as a witness at a joint trial would invoke his Fifth Amendment privilege. However, even if he were convicted at his own trial and had an appeal pending, he would testify at a trial of Metz held subsequent to his own (A. 28a).

Despite this detailed showing of express need, the motion was denied by the District Court and the denial was affirmed on appeal (A. 15a-16a, 30a-31a). In holding that the trial court had not abused its discretion, the Court of Appeals characterized the outline of Schiller's proposed testimony as simply hinting at the substance of the proffered testimony and stated that the trial court had determined that what was offered merely duplicated other evidence (A. 15a).[2] Second, the court found that Schiller's testimony lacked credibility because it would not contravene any apparent penal or other interest

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[2] Review of the District Court order shows no such finding of duplication. Rather, the District Court had found, in focusing on considerations of judicial economy, that "duplication of witnesses and evidence in this conspiracy case argues against severance" (A. 30a).

(A. 15a).[3] Finally, the court stated that reasons of judicial economy called for a joint trial (A. 16a).[4]

In a second effort to obtain critical exculpatory evidence, petitioner subpoenaed John Bland, a former co-defendant who had pleaded guilty to the conspiracy charge and was serving a six year sentence. On voir dire, Bland was advised of his constitutional rights and informed that he would not be subject to any federal prosecution for any acts arising out of the series of transactions culminating on December 15, 1977 (A. 16a). Bland asked if he could "take the Fifth" if he wanted to answer some questions but not others and was informed that he could not. He stated that he would like to testify that he did not know petitioner (except for a brief meeting in jail at the time of their arrests), and had not seen him on December 14, 1977. He stated that he would answer any questions concerning petitioner, but did not want to testify as to any other defendants (A. 16a). Bland was provided with counsel who advised him that invocation of the Fifth Amendment would be appropriate since he might be subject to criminal charges in the State of Florida. The witness then testified that he would assert his Fifth Amendment privilege and was excused. Although recognizing "the strictures against blanket invocation of the fifth amendment privilege" the Court of Appeals "refuse[d] to overturn a determination, made in the trial judge's informed discretion, that to compel any testimony

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[3] As set forth, *infra*, petitioner contends that the credibility of Schiller's testimony is an issue for the jury, and that since Schiller was going to testify as to his personal knowledge, whether his testimony was against his penal interest is not material. Moreover, Schiller's proffered testimony was, in fact, against his penal interest.

[4] The court ignored the fact that at the time the motion was filed Mrs. Metz had been severed for reasons of health and a second trial was, therefore, likely.

from Bland would violate his constitutional privilege" (A. 17a).[5]

Reasons Why the Writ Should be Granted.

I. The Denial of an Opportunity to Present a Substantive Defense Hinging on Exculpatory Evidence Possessed by Two Co-Defendants Abrogated Petitioner's Sixth and Fifth Amendment Rights to Present Witnesses on his Own Behalf and to a Fair Trial.

The right to present a defense is one of the most critical components of a fair trial and the due process of law guaranteed by the Fifth and Sixth Amendments to the United States Constitution. Indeed, as this Court has stated, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). See also *Washington* v. *Texas*, 388 U.S. 14, 19 (1967):

> "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

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[5]The Court of Appeals also upheld the District Court's refusal to admit, pursuant to Rule 804(b)(3), a prior sworn statement in which Bland stated that he had not known or seen Metz during the course of the conspiracy as not "clear error" since the corroboration proffered was, in the court's view, insufficient.

In this case petitioner's exercise of this fundamental right hinged on obtaining the exculpatory testimony of two key witnesses — Ronald Schiller and John Bland. Both of them were central figures in the events of December 12-14, 1977. Schiller had been observed by government agents at Metz' house on three occasions on the day of the 14th and Bland had been observed there once. Both had been integrally involved in negotiating with the undercover agents for the sale of the cocaine. Had petitioner been able to present their testimony to the jury, both of them would have admitted their own participation in the events (Bland, in fact, had already pleaded guilty) and would have testified that they had not met petitioner at his residence on the day of the 14th (contrary to the testimony of the only government agent to identify petitioner as being present at his home) and that petitioner had not participated in any conspiracy to possess or distribute cocaine with them. Indeed, Bland would have testified that he did not know Metz. Moreover, Schiller would have explained the "how" and "why" of his visits and "how" and "why" certain contraband ended up in Metz' house in a manner exculpating Metz from any conspiratorial involvement. In sum, their testimony would have presented a substantive defense and rebutted inferences of guilt from the two factors upon which the government's proof of Metz' participation in the conspiracy charged rested — the co-defendants' presence at Metz' residence on December 14 and the presence of a small amount of cocaine in his residence.

This exculpatory testimony was critical to Metz' defense of nonparticipation. Disproving participation in a conspiracy — an agreement — is, at best, a difficult burden.[6] Here, the court made it insurmountable. Short of proving incommuni-

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[6] Of course, the burden of proving petitioner's guilt beyond a reasonable doubt remained with the government. The central question is whether the evidence excluded would have raised that reasonable doubt.

cado incarceration during the time period of a conspiracy, what better evidence is available to a defendant who seeks to demonstrate his nonparticipation than the testimony of co-defendants who admit their own participation and testify that defendant was not a participant? Cf. *Washington* v. *Texas*, *supra*, where this Court held that a state could not statutorily disqualify a co-participant from testifying on behalf of a defendant. The witness is on the stand, subject to cross-examination, and the jury, presented with both the government's and the defendant's version of the facts, can make its own assessment of credibility and probity. Without such testimony, a conspiracy defendant caught in a web of circumstantial evidence can only attempt to disprove discrete overt acts or rebut testimony of specific observations of government witnesses. In a case such as the one at bar, where the defendant is charged in only one overt act and few specific observations of him are made, the difficulties of proving nonparticipation, or of disproving participation, are heightened by the absence of specific rebuttable charges.[7]

The Sixth Amendment right to present witnesses affords a defendant an absolute right to testify on his own behalf. The right to present exculpatory testimony from a co-defendant — testimony which may be viewed as more impartial than a defendant's own denial of guilt and, in a case such as the instant

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[7] In this case, the only overt act with which petitioner was charged was maintaining and controlling his residence and being in joint possession of a large quantity of cocaine. Maintaining and controlling a residence is certainly not evidence of participation in a conspiracy, and no large quantity of cocaine was ever found. Petitioner did attempt to disprove the one specific observation of a government witness — one agent's testimony that he saw Metz at his house on the afternoon of December 14 — by testimony from his father that petitioner had been staying with him at the time because of marital difficulties and testimony from an individual who had picked him up at his father's that morning, seen him at his place of business at various times throughout the day, and driven him home late that night.

one, may be the only way a defendant can even hope effectively to rebut the inferences of participation in a conspiracy — is also an integral component of the Sixth Amendment. Accordingly, a defendant's requests for measures necessary to effectuate that right, such as severance from a co-defendant willing to provide exculpatory evidence at a separate trial, should not be denied without a showing of compelling necessity by the government. Yet petitioner was deprived of the cornerstone of his defense by the denial of his motion for severance from co-defendant Schiller, and the court's ruling as to Bland permitting blanket invocation of the Fifth Amendment, refusing to permit inquiry into a limited area, and excluding a prior sworn statement. These rulings were affirmed by the Court of Appeals on the basis of erroneous findings, misapprehensions as to the relevant law, and application of erroneous standards of review — standards which resulted in the abdication of the court's responsibility to provide meaningful review of issues critical to petitioner's constitutional rights to call witnesses on his behalf and present a defense, and to a fair trial and due process of law.

A. *The Denial of Severance Abrogated Petitioner's Sixth and Fourteenth Amendment Rights.*

A number of lower courts have recognized that the denial of severance sought to enable a defendant to obtain the exculpatory testimony of a co-defendant can constitute a denial of due process of law. In reaching their determinations the courts have enunciated different factors to be considered, have accorded varying weights to those factors, and have imposed varying burdens of proof in assessing whether severance is required. See, e.g., *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965); *United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977); *United States* v. *Shuford*, 454 F. 2d 772 (4th Cir. 1971);

Byrd v. *Wainwright*, 428 F. 2d 1017 (5th Cir. 1970).[8] District Court decisions have been reviewed under an abuse of discretion standard. Petitioner contends that a motion for severance based on the need for exculpatory testimony from a co-defendant involves the Sixth Amendment right to call witnesses and present a defense as well as due process of law, and that the courts have failed to weigh adequately that factor in their calculus. The key factors to be considered are whether the co-defendant will, in fact, testify on the moving party's behalf at a separate trial and the nature of the proposed testimony — whether it is, in fact, exculpatory and necessary to the moving party's defense. Given the fundamental nature of the constitutional right involved, consideration of judicial economy cannot be given overriding weight.[9] Nor should the court's assessment of the credibility of the proposed testimony be af-

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[8]For example, in *United States* v. *Echeles*, *supra*, the court stated that the credibility of the witness' proposed testimony was not an issue for the court to determine, while in *Byrd* v. *Wainwright*, *supra*, the court held consideration of credibility to be appropriate. In *United States* v. *Martinez*, 486 F. 2d 15 (5th Cir. 1973), representations of counsel as to the probability of a co-defendant's testifying were deemed sufficient; in *United States* v. *Frumento*, 409 F. Supp. 143 (E.D. Pa. 1976), they were not; and in *United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977), the court noted that they might not be. What is required to show a defendant's need for the testimony of a co-defendant and what will constitute exculpatory testimony sufficient to justify severance are also questions upon which the courts differ. Compare *United States* v. *Baskes*, 433 F. Supp. 799 (N.D. Ill. 1977), and *United States* v. *Abraham*, 541 F. 2d 1234 (7th Cir. 1976), with *United States* v. *Vigil*, *supra*, and *United States* v. *Veloz*, 421 F. Supp. 1266 (E.D. Wis. 1976).

[9]New procedures which meet both the needs of the defendant seeking severance and the court's interest in judicial economy can be developed. For example, two juries could be impanelled simultaneously — one for the defendant seeking severance, one for his co-defendants. Both juries could sit in the same courtroom and jointly receive the evidence that would be duplicated if separate trials were held. When evidence that would not be introduced at both trials, such as the testimony of a co-defendant who would not be testifying at his own trial, is to be heard, the jury hearing the case in which such testimony would be inadmissible could be sent out of the courtroom.

forded weight in determining whether a severance is necessary; the credibility of the testimony is primarily a question for the jury.

Petitioner also submits that the abuse of discretion standard currently employed by the courts is erroneous. Where fundamental constitutional rights are involved a more stringent standard of review must be employed. Deference to the discretion of the trial court cannot be permitted to pretermit an independent assessment of the relevant facts and applicable law by an appellate court and an independent review of the effect of the trial court's decision on a defendant's constitutional rights. For example, although limitations on the scope of cross-examination are usually reviewed only for abuse of discretion, in *Davis* v. *Alaska*, 415 U.S. 308 (1974), this Court held that the limitation on cross-examination affected defendant's fundamental constitutional right to confront witnesses, made an independent review, and reversed for constitutional error, without mention of abuse of discretion.

Despite the plethora and diversity of lower court decisions, this Court has not yet set forth any standards to guide the district courts in making the initial assessment and balancing of rights where severance is sought to obtain exculpatory testimony from a co-defendant, or to guide the courts of appeals in reviewing those initial determinations. This case presents this Court with an opportunity to establish the parameters of and weights to be afforded to the constitutional rights and other factors involved, to enunciate standards to guide district courts in making their determinations and to set forth the appropriate standard of review to be employed by courts of appeals.

Applying the relevant criteria for severance, the proper balance, and the appropriate standard of review to the facts and circumstances of this case requires reversal of the decision below. In affirming the denial of severance the Court of Appeals

erred in respect to three crucial findings. Contrary to the finding below, the District Court made no finding that Schiller's proposed exculpatory testimony would be duplicative. Rather, the trial court found that the testimony at separate trials would be duplicative (A. 30a). The court also erred in finding that petitioner made "no clear showing of specific and significant exonerative facts" in his proffer of Schiller's proposed testimony (A. 15a). The proposed testimony included specific rebuttal of a key meeting, specific denial of petitioner's participation in the conspiracy by one who, by admitting his own central role, would be in a position to know, and a proffer of testimony to explain the "how" and "why" of circumstantial evidence against petitioner in a manner that, if believed by the jury, would totally absolve petitioner from any conspiratorial liability. Short of submitting a deposition — which, since it would probably be admissible against the witness at his own trial, would vitiate the witness' Fifth Amendment rights and negate the basis on which he offered to testify — no greater detail could be provided, and, petitioner submits, none was necessary. Moreover, the court erred both in relying on its finding that Schiller's proposed testimony "lacked credibility because it would not contravene any apparent penal or other interest" (A. 15a) as a basis for affirming the denial of severance, and in the finding itself. The key questions to be answered by the court in determining whether severance is required are whether the proposed testimony is exculpatory and necessary to a defendant's defense and whether it is likely to be available at a separate trial — not whether the witness' testimony would be credible to the finder of fact or against his penal interest. The credibility of the proposed testimony is a matter for the jury. See, e.g., *United States* v. *Echeles*, 352 F. 2d 892, 898 (7th Cir. 1965); cf. *Byrd* v. *Wainwright*, 428 F. 2d 1017, 1021 (5th Cir. 1970). The question for the court is primarily one of relevancy — if believed, was

Schiller's proposed testimony relevant to the jury's determination of petitioner's guilt or innocence? This question, petitioner submits, must be answered affirmatively. Moreover, analysis of the credibility of Schiller's proposed testimony in terms of penal interest is erroneous; petitioner was not seeking the admission of a hearsay declaration. Rather, he was seeking to put on the witness stand, subject to cross-examination, a witness with personal, relevant, and important knowledge.[10]

Finally, the weight given to considerations of judicial economy was misplaced. Given Mrs. Metz' severance for reasons of health, a second trial was probable. Nor was petitioner's motion belated. As set forth in the motion, it was filed as soon after Schiller's offer to testify as possible (A. 27a-28a), and prior to the taking of evidence. Moreover, the court's obligation to safeguard a defendant's constitutional rights is a continuing one.

In addition to misapprehending and misapplying the relevant criteria, the Court of Appeals reviewed only for abuse of discretion — a standard which, in light of the fundamental Sixth Amendment interests involved, must be rejected as inappropriate to the issue presented, see *supra*.

Accordingly, petitioner submits that certiorari should be granted to set appropriate standards to guide the lower courts in making and reviewing determinations as to the necessity for

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[10] In any event, the proposed testimony was against Schiller's penal interest. His proffer included admissions of his own guilt as well as exculpation of petitioner. These admissions could subject him to criminal liability in the State of Florida, and if a retrial in this case were to be granted for any reason they could be admitted against him at a subsequent trial. Nor is it relevant that, standing alone, the portion of his proposed testimony exonerating petitioner is not against his penal interest. His proposed testimony was proffered as an entity and must be judged as such. See, e.g., *United States* v. *Goodlow*, 500 F. 2d 954 (8th Cir. 1974), and *United States* v. *Barrett*, 539 F. 2d 244 (1st Cir. 1976), for cases in which the courts have refused to subdivide testimony into inculpatory/exculpatory components and have held both portions admissible as declarations against penal interest.

severance where the right to present a defense is implicated, and the decision below should be reversed for failure to apply appropriate criteria and standards to the facts of this case.

B. *The Refusal to Permit Limited Examination of a Former Co-Defendant and the Allowance of his Blanket Invocation of the Fifth Amendment Abrogated Petitioner's Fifth and Sixth Amendment Rights.*

Petitioner's efforts substantively to present his defense of nonparticipation to the jury and to rebut the government's evidence concerning his presence at his house on the afternoon of December 14, 1977, were further hamstrung by the trial court's ruling that John Bland, a convicted participant in the conspiracy, would be allowed a blanket invocation of the Fifth Amendment, and the appellate court's review of that determination only for abuse of discretion.

In light of Bland's voir dire testimony that he did not know petitioner (except for a brief encounter subsequent to their arrests), had not met with him in the afternoon of December 14, 1977, and was willing to answer any questions concerning petitioner but would not testify concerning the other defendants, the trial court's decision to refuse to permit inquiry into this limited area and his determination that a blanket invocation of the Fifth Amendment (based on potential criminal liability in the State of Florida) was appropriate was erroneous. As with the denial of severance, the courts below failed to recognize and give proper weight to petitioner's Sixth Amendment right to present a defense.

The area of proposed inquiry was a discrete one — the witness' relationship, or nonrelationship, to petitioner; cross-examination could, and should, properly have been limited to that issue. Inquiry into the witness' relationship to other defendants would have been irrelevant to the subject of the di-

rect examination, and cross-examination must be reasonably related to the subject testified to on direct examination. See, e.g., *Semler* v. *United States*, 332 F. 2d 6 (9th Cir. 1964), *cert. denied*, 379 U.S. 831 (1964); *United States* v. *Avila*, 469 F. 2d 276 (9th Cir. 1972); *Branch* v. *United States*, 171 F. 2d 337 (D.C. Cir. 1948); *Simon* v. *United States*, 123 F. 2d 80 (4th Cir. 1941). In *Semler* v. *United States*, *supra*, for example, a witness testified on direct examination concerning the sale of stolen property to the defendant. A refusal to permit cross-examination as to sales of stolen property to others was affirmed since "[t]he cross-examination in question was on a subject not gone into on direct." 332 F. 2d at 7.

Since Bland's proposed testimony — that he did not know petitioner and had not met with him on December 14, 1977 — could not reasonably tend to incriminate him, a willingness so to testify cannot constitute a waiver of his Fifth Amendment privilege as to other, unrelated areas of testimony where he might reasonably fear that answers to questions would provide a link in the chain of evidence against him. See, e.g., *Grudin* v. *United States*, 198 F. 2d 610 (9th Cir. 1952) (testimony concerning non-incriminating letter about an automobile, its registration slips, and the expectation of receipt of a check did not constitute waiver of privilege as to incriminating questions concerning later transactions involving the same automobile registration slips and check). Thus, with direct examination limited to Bland's relationship with petitioner, his invocation of the Fifth Amendment as to other matters would have been appropriate and it was error to inform him, in effect, that any testimony would constitute a waiver of his privilege. See, e.g., *Brown* v. *United States*, 356 U.S. 148 (1958) (breadth of waiver of privilege against self-incrimination is determined by scope of relevant cross-examination).

It was only after being erroneously informed that he would not be permitted to invoke the Fifth Amendment if he testified

at all that Bland informed the court that he would assert his privilege and refuse to testify. The court's acceptance of this blanket invocation, without further inquiry, was plainly wrong. Blanket invocation of the Fifth Amendment, without inquiry as to whether answers to the particular questions to be asked would reasonably tend to incriminate the witness, is improper (see, e.g., *United States* v. *Moreno*, 536 F. 2d 1042 (5th Cir. 1976)), and the prejudice is compounded where, as here, the proposed non-incriminating testimony excluded by allowance of the privilege was essential to effectuation of petitioner's fundamental constitutional right to present a defense. Claims of privilege must be scrutinized with special care when they work to deprive a defendant of a fundamental constitutional right — not, as was done here, with an apparently relaxed standard of review.

Accordingly, petitioner submits that proper limitations on the scope of cross-examination and proper analysis of the concept of waiver lead inexorably to the conclusion that Bland should have been permitted to testify as to his relationship with petitioner and to invoke his Fifth Amendment privilege with respect to cross-examination concerning his relationship with other defendants, and that the erroneous allowance of a blanket invocation of the privilege was constitutional error, resulting in the abrogation of petitioner's Sixth Amendment right to present a defense.

This error was compounded by the court's exclusion of a prior sworn statement given by Bland to counsel for a co-defendant. In that statement he admitted that he was serving a six year sentence pursuant to his plea of guilty to the conspiracy charged and asserted that he had not known and had not seen petitioner during the pendency of the conspiracy — a statement which the court accepted as being against his penal

interest.[11] By virtue of the court's refusal to permit properly limited assertion of the Fifth Amendment privilege, Bland was rendered unavailable as required for admission of a prior statement pursuant to Rule 804(b)(3) of the Federal Rules of Evidence. However, the court found an absence of the clear corroboration required under the rule. Petitioner submits that the trial court erred in rejecting Bland's "repeated reaffirmance of the statement" and the testimony of petitioner's alibi witnesses as sufficient corroboration and that the Court of Appeals erred both in failing to find "clear error" and in applying the clear error standard. Where, as here, the exclusion of the statement served to deprive petitioner of his fundamental constitutional right to present a defense, the Court of Appeals should have undertaken independent review and upon such review should have reversed the trial court's ruling.

In sum, the totality of the actions of the courts below in refusing to grant a motion for severance to enable petitioner to present exculpatory testimony of a co-defendant essential to his defense, in permitting blanket invocation of the Fifth Amendment despite a request for proper limitation of the scope of cross-examination, thereby depriving petitioner of the exculpatory testimony of a second witness, and in excluding a prior sworn statement of that witness, resulted in the wholesale deprivation of petitioner's Sixth and Fifth Amendment rights to present a defense and to due process of law warranting review by this Court to remedy this deprivation and to establish standards and guidelines to assist lower courts in making such determinations in the future.

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[11] Indeed, in light of the court's ruling that the witness was properly invoking his Fifth Amendment privilege in refusing to testify, no other conclusion could be reached. It should be noted that Schiller's proposed testimony — admitting his own guilt and exculpating petitioner — is similar in nature to Bland's statement. Petitioner submits that the court's rejection of Schiller's testimony as being against his penal interest is inconsistent with its finding as to Bland's statement.

II. THE DECISION BELOW, JUSTIFYING A WARRANTLESS ENTRY INTO PETITIONER'S HOME ON THE BASIS OF EXIGENT CIRCUMSTANCES, WAS ERRONEOUS, BASED ON IMPROPER STANDARDS OF REVIEW, AND IN CONFLICT WITH THE DECISION OF THE COURT IN UNITED STATES V. ROBERTSON, 606 F. 2d 853 (9TH CIR. 1979).

At 12:15 A.M. on December 15, 1977 — almost four hours after the arrests of co-defendants Bland, Schiller and Ruggiero — officers, believing that petitioner's residence was the "stash pad" for the promised but undelivered cocaine, effected a warrantless entry into petitioner's residence to "secure" it pending application for a search warrant which was issued at 3:30 A.M., but not executed until 7 A.M. since nighttime entry had not been authorized.[12]

In light of the well recognized constitutional preference for a warrant, and the high degree of protection afforded against warrantless invasions of private residences, the government bears a heavy burden of justification to support its warrantless actions. Petitioner submits that that burden was not met here and that the court below failed to analyze the situation under a sufficiently stringent standard of review. He also submits that the decision below conflicts with the decision in *United States* v. *Robertson*, 606 F. 2d 853 (9th Cir. 1979), and that this Court should take this opportunity to clarify the parameters of the exigent circumstances exception to the warrant requirement and establish appropriate standards of review to guide the lower courts.

Probable cause, if it arose at all, arose at the very latest by 9:30 P.M. when, after the arrests of the individuals who had

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[12] Approximately forty minutes after the entry the officers observed a small lump of cocaine on the floor.

been negotiating the aborted cocaine transaction, the agents involved in the investigation had pooled their knowledge and reached their conclusion that petitioner's residence was probably the stash pad.[13] Yet a warrant was not obtained until 3:30 A.M. — at least six hours, and probably seven or eight hours or more after probable cause arose, and more than three hours after the officers had "secured" the residence.

Petitioner submits that the government's claim of exigent circumstances is belied by the actions of its own agents and that the courts below erred in their analysis and standard of review. Indeed, the magistrate who eventually issued the warrant apparently found no exigent circumstances, for despite having been aroused at 3:00 A.M., she did not authorize nighttime execution.[14]

Despite the claim of exigent circumstances the officers stationed outside petitioner's residence took no action when they observed an individual leave and return between 9:45 and 10 P.M. At 10:30 P.M. the officers observed Mrs. Metz and another individual leave the house. They were followed and stopped; a search of her person and the vehicle disclosed no contraband; and she was detained and questioned for an hour and a half. No action was taken at the residence during this time period. Nor did the departure and return of another individual at the residence between 11:40 and 11:50 P.M. spur the officers into action. It was only after 12 A.M. that the officers

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[13] Given the communications between the agents throughout the day, petitioner suggests that since the conclusion of probable cause was predicated on the visits of the arrested individuals to his home — the last of which ended at 7:15 — if probable cause existed (and petitioner claims it did not, see *infra*), it arose well before 9:30 P.M. and by 8:30 P.M. at the outside when the initial arrests were made and no cocaine was found.

[14] There is nothing in the record to indicate that the magistrate was informed that the residence had been "secured."

determined that a warrantless entry to "secure" the residence was necessary.

Petitioner submits that, applying the appropriate legal principles and an appropriate standard of review to these facts, the courts below could not properly have found exigent circumstances. If the officers feared imminent destruction or removal of the contraband (which was the purported reason for stopping Mrs. Metz)[15] why did they take no action at 9 P.M. when the first individual left the premises? Why did they take no action during the one and one half hours of the detention of Mrs. Metz? Why did they take no action when the individual left the house at 11:40 P.M.? Petitioner contends that no action was taken because none was appropriate. Rather, the government's delay between 9:30 P.M. and 12:15 A.M. — and the failure of the magistrate to authorize nighttime execution of the subsequently obtained search warrant — belies in no uncertain terms any claim of exigency and renders application of the exception to the warrant requirement totally untenable and constitutionally unjustifiable.

The need for an independent appellate review of questions of constitutional significance — where either a pure conclusion of law or a "finding of so-called fact . . . interwoven . . . with constitutional consequences" is involved, *Davis* v. *United States*, 328 U.S. 582, 599 (1946), has been long recognized by this Court, see, e.g., *Davis* v. *United States*, *supra*. Yet the Court of Appeals did not enunciate the standard of review it was utilizing, and it is not clear that it made an independent

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[15] Petitioner submits that the only reason for stopping Mrs. Metz was to attempt to obtain information to bolster their suspicions that the residence was the stash pad, and that the stop and detention were unjustified. Accordingly, any alleged exigency that resulted from the stop was caused by the agents' own unlawful actions and cannot justify reliance on the exigent circumstances exceptions for the entry of the residence. See, e.g., *United States* v. *Rosselli*, 506 F. 2d 627, 630 (7th Cir. 1974).

application of the relevant constitutional principles to the facts, rather than simply, *sub silentio*, carrying over the "clearly erroneous" standard applied to its review of the underlying facts to its conclusions of law. Proper independent analysis, utilizing the relevant legal standards set forth in *United States* v. *Robertson*, 606 F. 2d 853, 859 (9th Cir. 1979), petitioner submits, would have mandated reversal. Accordingly, petitioner urges this Court to review this case to rectify the constitutional error and reemphasize, for the guidance of the appeals courts, the need for independent analysis of constitutional questions.

Comparison with *United States* v. *Robertson*, 606 F. 2d 853 (9th Cir. 1979) — a case which petitioner submits is in direct conflict with the decision in this case — demonstrates the errors below. In *Robertson*, police held a home containing a suspected bank robber under surveillance for two hours awaiting the arrival of the officer in charge of the investigation, and then, without a warrant, entered the home to make an arrest. In remanding the case for further fact findings the court enunciated the legal principles and standards to be applied in determining the applicability of the exigent circumstances exemption, stating that a warrantless entry could be justified only if:

> "a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained. The need for an immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement. There must be no practical way to avoid these risks and yet follow the Constitution's mandate of detached judicial supervision of such intrusions. *Warden* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782

(1967); *McDonald*, 335 U.S. at 455-56, 69 S.Ct. 191." 606 F. 2d at 859.

The court indicated that if the police had probable cause prior to the arrival of the officer in charge, there would be no exigent circumstances and the warrantless entry would be unconstitutional in light of the officers' willingness to wait for the arrival of the officer before entering the home — "they may have passed up a reasonable opportunity to have obtained a warrant. If so, their failure to seek the approval of a detached judicial officer cannot be excused." *Id.* The court further indicated that if the officer in charge, who had been in radio communication with his office over the two hour period, had been informed of facts which, combined with his own knowledge, gave rise to probable cause and had been able to communicate with his office and initiate the warrant process prior to his arrival, the exigent circumstances exception would also be inapplicable. *Id.* at 859, 860.

Had the court below applied the standards and analysis of *Robertson* — standards and analysis which petitioner submits are constitutionally mandated — the entry in this case, and the seizure of the small lump of cocaine, should have been held unlawful.[16] Accordingly, petitioner submits that this Court should grant review to establish the parameters of the exigent circumstances exception to the warrant requirement and to resolve the conflict between this case and *Robertson*.[17]

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[16] The seizure of the cocaine can be justified under the plain view exception only if the officers were lawfully on the premises.

[17] In addition to the absence of exigent circumstances, petitioner submits that there was no probable cause to believe that the items sought would be on the premises to be searched at the time of the search as required by the Fourth Amendment. The warrant was issued on the basis of the officers' observations of individuals visiting the Metz residence after meetings with

Conclusion.

For the aforementioned reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DEA agents at which they were negotiating the sale of forty pounds of cocaine. However, the individuals also went to another residence, and the surveillance lost contact during one trip. Moreover, the forty pounds were never produced and the one pound that was produced was not observed being removed from Metz' residence. Thus, although the officers may have suspected that Metz' house was being used as a stash pad, petitioner submits that the articulable facts necessary to elevate these suspicions to probable cause were patently absent. Moreover, he submits that the decision below directly conflicts with the decision in *United States* v. *Taylor*, 599 F. 2d 832 (8th Cir. 1979), and that that conflict should be resolved by this Court.

Appendix.

United States Court of Appeals for the Fifth Circuit.

No. 78-5621.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

WALTER METZ AND RONALD D. SCHILLER,
DEFENDANTS-APPELLANTS.

December 10, 1979.

Rehearing and Rehearing En Banc Denied February 14, 1980.

William M. Moran, Thomas G. Murray, George D. Gold, Miami, Fla., for Metz.

Richard E. Young, Dallas, Tex. (Court-appointed), for Schiller.

Shirley Baccus-Lobel, Asst. U.S. Atty., Dallas, Tex., for plaintiff-appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

FAY, Circuit Judge:

Ronald Schiller and Walter Metz were convicted in the District Court for the Northern District of Texas of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (1976). Their points on appeal emanate primarily from the illicit confederation's magnitude of time, geography, and cast. Schiller complains that delay ensuant to the coordination of multiple defendants' prosecutions violated his right to a speedy trial. Both Schiller and Metz contend that indictment and proof of a single complex conspiracy rather than multiple conspiracies created reversible errors in joinder of defendants, variance between indictment and evidence, admission of alleged coconspirators' extrajudicial statements, and the trial court's charge to the jury. Additionally, Metz challenges the sufficiency of evidence showing his participation in the far-reaching scheme, and asserts that even the evidence tending to implicate him was unlawfully seized in an illegal search of his home. Metz also argues that the trial court improperly refused to compel purportedly exculpatory testimony from a coconspirator who invoked the constitutional privilege against self-incrimination. Finally, Metz complains that the prosecutor's closing argument, characterizing Metz as a "dope pusher" active throughout the scope of the conspiracy, was inflammatory and unsupported by any evidence. We have reviewed these several complaints in detail. Finding no reversible error, we affirm the convictions of both appellants.

FACTS

Posing as a large-scale narcotics supplier, federal Drug Enforcement Administration agent Paul Clayton first met Harold Oldham in Los Angeles, California, in March, 1976. Oldham,

the central figure in this complex conspiracy, informed Clayton that he could supply large quantities of cocaine. Not until August, 1977, however, did agent Clayton call Oldham to discuss a possible transaction. From August to November, 1977, Clayton, Oldham and others met in Dallas, Los Angeles, Miami, and the Cayman Islands, to contrive a large cocaine transaction and to plan the laundering of the illegally obtained proceeds. Additionally, Clayton and another agent, Herbert House, consummated with Oldham a smaller preliminary transaction in Miami: on September 17, they exchanged $20,000 for one pound of cocaine. The plans for the larger deal culminated in the events transpiring December 11 through December 14, 1977.

In Dallas on December 11, agents Clayton and House agreed to buy from Oldham forty pounds of cocaine for $850,000. On December 12, they met as agreed at the Calder Holiday Inn near Miami, Florida. Needing time to acquire and mark government funds for the transaction, the agents arranged to plan with Oldham all the details of the exchange the following evening. At 8:00 p.m. on December 13th, Clayton, House, and two other agents met Oldham at the Marriott Motel in Miami. With Oldham were Shirley Ruggiero and John Bland. At one point, Ruggiero offered an immediate exchange of five pounds of cocaine, which was then at her home. Upon the agents' refusal to deal, she remarked that she would have to return the cocaine to the "stash pad" that night.

According to plan, the four undercover agents met Oldham, Ruggiero, and Bland at the Calder Holiday Inn the next morning. Appearing for the first time was appellant Schiller, who accompanied the other sellers. Oldham stayed at the motel until his arrest about 8:30 that night. Schiller, Ruggiero, and Bland [the sellers] travelled with the agents from the motel to the Opa Locka Airport where they inspected $850,000 cash held in a disguised government airplane. After the inspection,

Bland stayed at the plane, while Schiller and Ruggiero left to get the cocaine. Surveilling agents determined that Schiller first took Ruggiero to her house and then drove alone to the residence of appellant Metz, where he stayed from 12:45 p.m. to 3:00 p.m. Schiller then returned to Ruggiero's house, picked up Ruggiero and her son, and drove to yet another motel, the Hialeah Holiday Inn, where Bland and the agents had obtained a room for inspecting and testing the cocaine. In the room, Schiller revealed that he had only one pound of cocaine. He proposed that the deal be finished in increments rather than in one exchange, apparently to protect the cocaine supplier from theft. The agents vehemently rejected the proposal, citing the extensive delays that had already occurred throughout the day. Throwing the pound back to Schiller, they insisted on immediate production of the entire forty pounds. Schiller agreed to return to the stash pad to seek release of at least five pounds.

Taking Bland, Ruggiero, and Ruggiero's son, Schiller drove to appellant Metz's home, where a surveilling agent saw Metz meet them at the door. After a fifteen minute stay, Schiller and the others left, returning to Ruggiero's home around 5:00 p.m. From there Bland telephoned the agents to inform them that they had the five pounds, but that Schiller wanted to exchange one pound first. Reluctantly the agents agreed. Schiller, however, did not proceed directly to the motel where the agents were waiting, but drove back to Metz's. There he stayed for over an hour. Not until 7:15 p.m. did Schiller, Ruggiero, Ruggiero's son, and Bland arrive at the motel room. Again they offered one pound. This time the agents kept the pound, claiming it as compensation for their expense and trouble.

Apparently sensing the futility of further negotiation without production of the cocaine, Schiller and the others left. After stopping at a pay phone to place several calls, they turned

back toward the motel. Realizing that the four had not procured any more contraband and were not likely to, agents stopped and arrested them around 8:30 p.m.

Sporadic surveillance of Metz's residence throughout the day had revealed little significant activity until late in the evening. Around 10:30 p.m., a woman left Metz's townhouse. She had not driven far when she was stopped by government agents, who acted under their headquarter's instructions to determine whether contraband was being moved from the suspected stash pad. After searching the woman for weapons, the agents searched the car with consent of the woman, who was appellant Metz's wife. The agents found no contraband but nonetheless continued to detain and question Wanda Metz at length, informing her that the townhouse she had just left was a suspected stash pad for a large quantity of cocaine.

Meanwhile, drug enforcement agents at headquarters for the operation had decided to "secure" the Metz residence to prevent destruction of the cocaine suspected to be there. An agent holding Mrs. Metz so informed her and requested that she give them her house key and accompany them to the townhouse. Initially she refused, but agreed to surrender the key and go with them when she realized not only that they were going to secure the residence irrespective of her cooperation, but also that they would take her to jail immediately if she refused.

Upon their return to the townhouse shortly after midnight, one agent took the keys from Mrs. Metz's hand. She asked for them back, but the agent refused. Mrs. Metz then announced, "It's me, and I am with the police." The agent immediately opened the door. Inside were appellant Metz and Mrs. Metz's brother. Although Metz protested the warrantless entry, the agents went inside. They ordered Metz, his wife, and her brother to sit down. Pending issuance of a search warrant, the

agents conducted no search, but did seize a lump of cocaine visible on the kitchen floor. Additionally, they observed tracing paper, a heat sealer, and a triple-beam scale on the refrigerator in the kitchen.

Appellant and his wife were taken to the agents' headquarters at 2:00 a.m. Agents remained in the townhouse until daylight, the search time authorized by a warrant issued at 3:30 a.m. At about 7:00 a.m., they conducted a search which netted 2.1. grams of cocaine. Agents found cocaine in the toilet and tub of an upstairs bathroom and in several places in the kitchen downstairs. This contraband the agents seized, along with a roll of paper towels similar to the paper towel which wrapped the pound of cocaine delivered earlier by Schiller.

I. Speedy Trial

[1] Appellant Schiller contends that delay in his arraignment and trial violated both the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976), and the local speedy trial plan for the Northern District of Texas, which incorporated the statute's deadlines.[1] Schiller's arrest occurred December 14, 1977, and his indictment came 64 days later, February 16, 1978. The statute at that time required indictment within 45 days of arrest. *Id.* at § 3161(b), (f). His arraignment came fourteen days after indictment, instead of ten days as prescribed by the statute. *Id.* at § 3161(c). Following a continuance granted to his codefendants without Schiller's objection, his trial com-

[1] The initial Plan for the Northern District of Texas for Prompt Disposition of Criminal Cases [Speedy Trial Act Plan] was enacted pursuant to provisions of the Speedy Trial Act requiring federal district courts to adopt procedures instituting compliance with the Act. 18 U.S.C. § 3165(e)(2) (1976). Replacing that plan was another plan filed on June 20, 1978, and effective since July 1, 1979.

menced 172 days after arraignment, on August 21, 1978. The statute allowed only 120 days between arraignment and trial. *Id.* at § 3161(c), (g).

On appeal, Schiller contends that the trial court's denial of his motion to dismiss his indictment constitutes reversible error. He concedes that the Act's sanctions were not mandatory at the time of his trial. *Id.* at § 3163(c). Moreover, the local plan imposed no mandatory dismissal for delay. Speedy Trial Act Plan III(10)(d). Consequently, only delay violating the sixth amendment would compel dismissal. *United States v. Traylor*, 578 F.2d 108, 109 (5th Cir. 1978), *cert. denied*, 439 U.S. 1074, 99 S.Ct. 848, 59 L.Ed.2d 41 (1979).

Balancing prosecutorial conduct against Schiller's we find no unconstitutional delay. *See Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *United States v. Edwards*, 577 F.2d 883, 888 (5th Cir.), *cert. denied*, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978). To determine whether Schiller was denied a speedy trial, we consider the length of delay, the reasons for delay, Schiller's assertion of his rights, and what prejudice resulted. *Barker v. Wingo*, 407 U.S. at 530, 92 S.Ct. 2182; *United States v. Carter*, 603 F.2d 1204, 1206 (5th Cir. 1979). In this case, the threshold inquiry is dispositive. The relatively brief delays Schiller encountered do not rise to the level of presumptive prejudice. Therefore, we need not consider other factors in deciding that Schiller was not denied the right to a speedy trial. *Barker v. Wingo*, 407 U.S. at 530, 92 S.Ct. 2182 (1972); *United States v. Edwards*, 577 F.2d at 888. We do note, however, that Schiller did not object to the continuance granted to his codefendants, although he did move for dismissal after the indictment delay and did request severance prior to the continuance. *Barker v. Wingo*, 407 U.S. at 531-32, 92 S.Ct. 2182. Nor does Schiller

allege negligence or bad faith on the government's part. *Id.* at 531, 92 S.Ct. 2182. Moreover, Schiller cites no specific prejudice to his defense or personal rights, but claims only that prejudice inheres in any delay. Absent a showing that he suffered some particular injury, such as lost evidence or prolonged pretrial incarceration, Schiller cannot establish a constitutional infraction requiring reversal. *Id.* at 532, 92 S.Ct. 2182; *United States v. Noll*, 600 F.2d 1123, 1127-28 (5th Cir. 1979).

II. A Single Conspiracy or Several?

[2] Both appellants complain that their indictment was defective. They claim that it misjoined defendants because it alleged facts showing three discrete conspiracies, yet charged a single conspiracy comprised of several events. They enumerate as separate conspiracies with separate casts the preliminary transaction of September 17, the money-laundering scheme, and the aborted large-scale transaction of December 14. Accordingly, they argue that because misjoinder of defendants is inherently prejudicial, the trial court's refusal to dismiss the indictment is reversible. Fed.R.Crim.P. 8(b); *United States v. Lane*, 584 F.2d 60, 62 (5th Cir. 1978).

To determine whether misjoinder occurred, we consider whether the indictment's allegations, taken as true, establish a single conspiracy or several. *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977). In so doing, we consider whether the alleged facts reveal a "substantial identity of facts or partici-

pants" sufficient to meet the requirements of rule 8(b).[2] *United States v. Marionneaux*, 514 F.2d 1244, 1248-49 (5th Cir. 1975). Appellants correctly assert that Oldham's mere appearance in each phase of the conspiracy could not transform several conspiracies into a single scheme. *United States v. Levine*, 546 F.2d at 663. We find, however, that the indictment adequately shows a singular conspiratorial objective: a large-scale narcotics transaction. Adequately alleged as facets of that same cocaine distribution scheme were the plan to launder its illgotten proceeds, the preliminary sale on September 17, and the preparation for the December 14 transaction.

That the indictment did not charge appellants with active participation in each phase of the conspiracy does not effect misjoinder. *United States v. Wooldridge*, 572 F.2d 1027, 1029 (5th Cir.), *cert. denied*, 439 U.S. 849 and 851, 99 S.Ct. 150, 155, 58 L.Ed.2d 151, 154 (1978). Nor need the indictment have charged that appellants knew all the participants or details of the conspiracy, so long as it alleged their knowledge of the conspiracy's essential nature. *Id.*

[3] Appellant's claim of prejudicial variance between the indictment and proof similarly must fail. To prove appellants' complicity, the evidence need not have shown either their knowledge of every phase of the conspiracy or their participation in each event. *Blumenthal v. United States*, 332 U.S. 539, 556-58, 68 S.Ct. 248, 92 L.Ed. 154 (1947). Foreclosing a finding of variance, the proof adduced at trial adequately denoted not only appellants' knowledge of the single scheme

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[2] Fed.R.Crim.P. 8(b) provides:

> *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or *in the same series of acts or transactions* constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. (emphasis supplied)

with a single overriding objective, but also their knowledge of participation by others. *See id.* at 557, 68 S.Ct. 248. Evidence of Schiller's negotiations with agents, his viewing the cash to be paid, and his possession and offer of a pound of cocaine clearly indicated his knowledgeable cooperation. Proof implicating Metz is more sparse, but ample to denote his knowledge of the ultimate goal and his awareness of others' cooperative efforts to attain it. When the agents refused Shirley Ruggiero's offer to sell five pounds of cocaine the night before the scheduled large transaction, she remarked that she would have to return those five pounds to the stash pad. By that remark she revealed that her home was not the stash pad. Therefore, the next day's trips by the sellers, inevitably ending at either Ruggiero's or Metz's, strongly suggested that Metz's townhouse was the stash pad. Moreover, a surveilling agent testified that he saw Metz at the door of the townhouse at 5:00 p.m., thereby establishing Metz's presence during the course of other conspirators' visits. Finally, the search conducted on December 15 not only uncovered cocaine in Metz's house, but also revealed that disposal had occurred in several locations on different floors, suggesting that more than one person endeavored to eradicate any evidence of contraband. Since only two men were in the townhouse when police arrived with Mrs. Metz, the several places of disposal strongly implicate Metz's cooperation in the disposal of the cocaine.

[4] This evidence of appellants' knowledgeable cooperation in the single confederation not only conformed the proof to the indictment, but also established an adequate basis for admission against Metz of alleged coconspirators' extrajudicial statements, which are nonhearsay under Fed.R. Evid. 801(d)(2)(E). That rule permits the admission of a defendant's coconspirators' statements, if made in furtherance of a conspiracy and during its course. *United States v. Smith*, 550 F.2d 277, 281

(5th Cir.), *cert. denied*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977). Because proof independent of the statements was sufficient in this case to establish a prima facie case of the conspiracy's existence and Metz's participation in it, the trial court properly admitted the alleged coconspirators' statements. *See Glasser v. United States*, 315 U.S. 60, 74, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Oliva*, 497 F.2d 130, 132 (5th Cir. 1974); *United States v. Apollo*, 476 F.2d 156, 159 (5th Cir. 1973).[3] Metz does not suggest that no conspiracy existed, but only that he was not a member of it. Viewing the independent evidence already reviewed in the light most favorable to the prosecution, we cannot say that a reasonable jury necessarily would find that appellants played no part in a comprehensive agreement to possess cocaine with intent to distribute it. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1941); *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). Moreover, the district judge provided the cautionary *Apollo* instruction, charging the jury not to consider any declarations against appellants by other alleged coconspirators until sure of the conspiracy's existence and appellants' complicity.

[5] Because this evidence, independent of coconspirators' extrajudicial statements, would allow a reasonable jury to find Metz a conspirator, the aggregated evidence necessarily is sufficient to sustain his conviction. *United States v. Carreno*, 599 F.2d 680, 683 (5th Cir. 1979).

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[3] *Oliva* and *Apollo* were overruled recently in *United States v. James*, 590 F.2d 575, 579 (5th Cir.) *cert. denied*, ____ U.S. ____, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). Nonetheless, the *Oliva* prima facie standard governs, rather than the substantial evidence standard announced in *James*, because *James*, effective prospectively thirty days from the date of the opinion, postdated appellants' trial. See *United States v. Robinson*, 591 F.2d 1202, 1204 (5th Cir. 1979).

III. Search and Seizure

[6] Appellant Metz asserts error in the trial court's refusal to suppress incriminating evidence garnered in the search of his home. We agree with appellant that Mrs. Metz never consented to the agents' warrantless entry at midnight. The trial court, however, found that the agents had probable cause to believe cocaine was on the premises, under circumstances sufficiently exigent to validate the intrusion. We review this ruling mindful that the factual findings upon which it is based are reversible only if clearly erroneous. *United States v. Duckett*, 583 F.2d 1309, 1313 (5th Cir. 1978).

Throughout the day on December 14, surveilling agents had seen Schiller, Bland, and Ruggiero make several visits to appellant Metz's home, in circumstances implicating the townhouse as the storage site for the contraband. Each time the sellers promised the agents delivery of the cocaine, they travelled to Ruggiero's home or Metz's. Often one or more remained at appellant Metz's for several hours. Because Ruggiero's remark on the preceding night had ruled out her home as the stash pad, the agents' scrutiny began to focus on the Metz townhouse.

The arrest of Schiller, Ruggiero, and Bland at 8:30 that evening aborted the transaction. Thereafter, agents met at their headquarters to compare their observations. Correctly concurring that probable cause existed to believe that the Metz residence was indeed the stash pad, they initiated application for a search warrant. They also resolved to safeguard the cocaine from removal or destruction, cognizant of the delay preparation of the warrant would entail.

Accordingly, these agents at headquarters, informed of Mrs. Metz's departure, instructed the agents still watching the Metz townhouse to investigate. Questioning Mrs. Metz and searching her car uncovered no cocaine. Still believing the Metz

townhouse to be the stash pad, however, agents returned to the townhouse with Mrs. Metz, who surrendered her keys when threatened with jail. Over her protest, they used her key to enter the townhouse. The inefficacious and dilatory efforts to gain Mrs. Metz's voluntary cooperation vitiated any consent the agents may have sought. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49, 92 S.Ct. 2041, 36 L.Ed.2d 854 (1973). That the agents may have conducted an unlawful stop or that they used the key over protest, however, did not dispel the ongoing risk of the contraband's destruction. The delay incurred was not of the type or length which would ameliorate that emergency. *See G. M. Leasing Corp. v. United States*, 429 U.S. 338, 358-59, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977). The agents still had probable cause to believe that cocaine was on the premises and to fear its imminent destruction. Consequently, the circumstances which would have permitted an earlier entry justified the later one. *Cardwell v. Lewis*, 417 U.S. 583, 595-96, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). *See Roaden v. Kentucky*, 413 U.S. 496, 505, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); *United States v. Juarez*, 573 F.2d 267, 274-76 (5th Cir.), *cert. denied*, 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978); *United States v. Gardner*, 553 F.2d 946, 947-48 (5th Cir. 1977), *cert. denied*, 434 U.S. 1011, 98 S.Ct. 722, 54 L.Ed.2d 753 (1978).

[7] Appellant Metz complains that the agents' failure to knock and announce their authority rendered the entry unlawful, under the federal statute mandating such notice. 18 U.S.C. § 3109 (1976). Having failed to raise this issue before appeal, Metz forfeits any right to argue it now, absent a showing of plain error. *Fishing Fleet, Inc. v. Trident Ins. Co.*, 598 F.2d 925, 926 n.1 (5th Cir. 1979); *Evans v. Triple R. Welding & Oil Field Maintenance Corp.*, 472 F.2d 713, 716 (5th Cir. 1973). Even had the issue arisen below, however, Metz would not have prevailed. This court has recognized logical excep-

tions to the statute, at least two of which apply here. First, since compliance with the requirement could have induced destruction of evidence, agents need not have announced their entry. *United States v. Carter*, 566 F.2d 1265, 1268 (5th Cir.), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978). Second, announcement is not necessary if it would serve no useful function. *Wittner v. United States*, 406 F.2d 1165, 1166 (5th Cir. 1969). After Mrs. Metz's outcry at the door, any further statements by the agents would have been redundant.

[8] Upon entry, the agents merely secured the premises, conducting no search. By this conduct, they complied with the rule limiting the scope of warrantless searches to the rationale excepting the search from the warrant requirement. *See, Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); *United States v. Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978). The entry being unlawful, the agents' seizure of a small lump of cocaine from the floor beneath the kitchen counter merits exception to the warrant requirement under the plain view doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *United States v. Roach*, 590 F.2d 181, 184-85 (5th Cir. 1979).

[9] A more thorough search pursuant to the warrant revealed additional incriminating evidence. Appellant Metz challenges its admission, attacking the validity of the warrant itself under the affidavit truthfulness standard announced in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). If indispensable to a finding of probable cause, an affiant's false statement made knowingly, intentionally, or with a reckless disregard for the truth voids the warrant and bars its evidentiary fruits. Metz's attack falls far wide of the mark. He neither alleges nor offers proof that specific statements by the affiant, a government agent, were falsehoods

made deliberately or with a reckless disregard for the truth. *See id.* at 171, 98 S.Ct. 2674. Moreover, probable cause for a search would have existed even absent any unjustifiable reliance on the seller's promises to deliver forty pounds of cocaine. Agents' independent observations of the Metz residence and its visitors, along with the sellers' actual production of a pound of cocaine, constituted ample grounds for a warrant. *See id.* at 171-72, 98 S.Ct. 2674. Deeming the entry, search, and seizure lawful, we find no clear error in the district court's admitting the fruits into evidence.

IV. Exculpatory Evidence

A. *Schiller*

[10] Appellant Metz asserts error in the trial court's refusal to sever his trial from Schiller's to accommodate Schiller's proffered exculpatory testimony, unavailable in a joint trial because Schiller planned not to take the witness stand. Metz assumes a heavy burden, since the trial court's severance denial is reviewable only for abuse of discretion. *Byrd v. Wainwright*, 428 F.2d 1017, 1018 (5th Cir. 1970). Failing to make a clear showing that the denial created prejudice denying him a fair trial, Metz does not sustain that burden. *See United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973). First, Metz made no clear showing of specific and significant exonerative facts to which Schiller would testify, but "merely hinted at the substance" of the proffered testimony. *United States v. Marable*, 574 F.2d 224 (5th Cir. 1978). *See Byrd v. Wainwright*, 428 F.2d at 1020. The trial court further determined that even what was offered merely duplicated other evidence. Second, Schiller's purportedly exonerative testimony lacked credibility because it would not contravene any apparent penal or other interest of Schiller. *See United States*

v. Alfonso, 552 F.2d 605, 616 (5th Cir.), *cert. denied*, 434 U.S. 857, 98 S.Ct. 179, 54 L.Ed.2d 129 (1977). Finally, judicial economy considerations called for joint trial, especially in this complex conspiracy case. *See Byrd v. Wainwright*, 428 F.2d at 1020. To have granted Metz's belated motion for severance, made after trial had commenced, would have exacerbated that strain. We conclude that the denial of severance was not an abuse of discretion.

B. *Bland*

1. The Fifth Amendment Privilege

[11] Appellant Metz claims that the trial court erred in sustaining the assertion of fifth amendment privilege by John Bland, Metz's codefendant. Metz sought from Bland purportedly exculpatory testimony but was deterred by Bland's invocation of his right not to incriminate himself. Bland previously had pled guilty to the federal conspiracy charge and was serving his sentence. Consequently, he was not subject to further federal prosecution. Bland nevertheless refused to testify for Metz, unsure whether he would risk state prosecution and fearful that his testimony, exculpating Metz but inculpating other codefendants, would subject him to danger in prison.

To ascertain the validity of Bland's fifth amendment claim, the trial properly appointed counsel and questioned Bland, scrutinizing his rationale for refusing to testify. *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951); *United States v. Wilcox*, 450 F.2d 1131, 1136-37 (5th Cir. 1971), *cert. denied*, 405 U.S. 917, 92 S.Ct. 944, 30 L.Ed.2d 787 (1972). That inquiry satisfied the trial court that by testifying Bland might subject himself to state prosecution. The substantial possibility of prosecution sufficed to excuse Bland. *Hoffman v. United States*, 341 U.S. 479, 486-87, 71

S.Ct. 814, 95 L.Ed. 1118 (1951); *United States v. Melchor Moreno*, 536 F.2d 1042, 1046-47 (5th Cir. 1976). Appellant Metz asserts that the state's failure to prosecute within the time limits of Florida's speedy trial provision. Fla.R.Crim.P. 3.191(a) (1), relieved all risk of prosecution. Too many variables affect the time limits of that rule for the trial court to have been sure that Bland faced no risk of prosecution. *See, e.g.*, Fla.R.Crim.P. 3.191(d) (2). Absent any showing that the trial court abused its discretion in resolving the validity of Bland's claim, the decision must stand. *United States v. Melchor Moreno*, 536 F.2d at 1050 (5th Cir. 1976).

Appellant Metz further contends that, even if valid as to some matters, Bland's fifth amendment invocation embraced not only privileged testimony but also collateral matters posing no threat of prosecution. He argues that to elicit from Bland a statement negating any meeting with Metz on December 14, 1977, would not necessarily raise issues incriminating to Bland. We recognize the strictures against blanket invocation of the fifth amendment privilege. *Id.* at 1049. Nonetheless, we refuse to overturn a determination, made in the trial judge's informed discretion, that to compel any testimony from Bland would violate his constitutional privilege. *See United States v. Lacouture*, 495 F.2d 1237, 1239 (5th Cir.), *cert. denied*, 419 U.S. 1053, 95 S.Ct. 631, 42 L.Ed.2d 648 (1974).

2. Bland's Prior Sworn Statement

[12] Metz next asserts that the trial court's refusal to compel Bland's testimony made Bland "unavailable," under Fed.R. Evid. 804(b) (2). Therefore, Metz argues, the trial court should have admitted Bland's prior sworn statement taken before trial by the attorney for appellant Schiller. In that statement Bland professed never to have known or seen appel-

lant Metz during the course of the conspiracy to which he had pled guilty. The trial judge refused to admit the statement as an admission against penal interest, a hearsay exception under Fed.R.Evid. 804(b)(3). The trial court found that Bland's statement, taken in a nonadversarial setting, lacked the clear corroboration required by Rule 804(b)(3) to guarantee its trustworthiness. *See United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); *United States v. Bagley*, 537 F.2d 162, 168 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075, 97 S.Ct. 816, 50 L.Ed.2d 794 (1977). In his efforts to compel admission of Bland's statement, appellant Metz proffered as corroboration Bland's repeated reaffirmance of the statement. Metz also drew attention to the testimony of Metz's alibi witness, which placed Metz away from the townhouse on December 14. Additionally, appellant Metz stressed that the only agent claiming to have seen Metz at the townhouse changed a former representation that he had never seen him. Seeking to establish his absence from the townhouse, Metz argued that the agent's former testimony and the subsequent change corroborated Bland's statement implying Metz's absence.

Such proffers of corroboration do not convince us of clear error in the trial court's refusal to admit the statement under Rule 804(b)(3). *See United States v. Bagley*, 537 F.2d at 165. Moreover, having failed to meet the corroboration standards of one hearsay exception, the statement must also fail the equivalent trustworthiness standards of Fed.R.Evid. 804(b)(5). We agree with the trial court that the same proffers could not establish such circumstantial guarantees of trustworthiness as to mandate admission of Bland's statement under the residual hearsay exception. *United States v. Alvarez*, 584 F.2d at 702 n.10.

V. Charge to the Jury

[13] Appellant Metz through new counsel on appeal seeks reversal because the judge and attorneys at trial held a preliminary jury instruction discussion off the record before the recorded formal charge conference. Although the Court Reporter Act. 28 U.S.C. § 753 (1976), does mandate the recording of "all proceedings in criminal cases had in open court," *id.* at § 753(b)(1), trial counsel seized his opportunity to record objections during the formal charge conference. Consequently, no significant omission from the record occurred. Accordingly, we can conclude affirmatively that none of Metz's substantial rights was infringed. *See United States v. Selva*, 559 F.2d 1303, 1306 & n.5 (5th Cir. 1977).[4]

Moreover, we have considered that substance of the trial court's charge as a whole and find it a correct statement of the applicable law. *See United States v. Chandler*, 586 F.2d 593, 606 (5th Cir. 1978), *cert. denied*, 440 U.S. 927, 99 S.Ct. 1262, 59 L.Ed.2d 483 (1979). The judge adequately conveyed to the jury the law pertinent to Metz's theory of defense, correctly refusing to recount for the jury the factual arguments ensconced in Metz's requested instruction. *See United States v. Barham*, 595 F.2d 231, 244 (5th Cir. 1979). The judge informed the jury that "mere association" with conspirators could not establish Metz's complicity. That language disclosed the applicable legal principle without detracting from the significance of Metz's presence at the stash pad.

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[4] We also note that Metz's appellate counsel was present at trial as counsel to one of Metz's codefendants. Although we employ the more exacting standard of review commanded by the presence of different counsel on appeal, *see United States v. Selva*, 559 F.2d 1303, 1306, the lesser standard would have satisfied the underlying policy dictates in these circumstances. For a criticism of the *per se Selva* rule, *see United States v. Smith*, 591 F.2d 1105, 1109 n.1 (5th Cir. 1979).

[14] Metz further asserts error in the trial court's rejection of a requested instruction on sole, joint, actual, and constructive possession. We review this claim under the plain error standard because of Metz's failure to object to the omission. *See United States v. Marino*, 562 F.2d 941, 945 (5th Cir. 1977), *cert. denied*, 435 U.S. 996, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978). Metz contends that the omission erroneously deprived the jury of knowledge of the elements of the conspiracy's criminal objective. We fail to see how the requested instruction would have helped the jury assess Metz's conspiratorial role, although a more detailed definition of the substantive crime underlying the conspiracy might have been desirable. *See United States v. Martinez*, 496 F.2d 664, 669 (5th Cir.), *cert. denied*, 419 U.S. 1051, 95 S.Ct. 627, 42 L.Ed.2d 646 (1974). Having reviewed the charge in its entirety, we find that the trial court adequately instructed the jury on the elements of the crime charged. *See United States v. Marino*, 562 F.2d at 945.

[15] Finally, both appellants reassert their earlier argument that the evidence revealed multiple conspiracies. They claim error in the trial court's refusal to instruct the jury to acquit if the government proved only appellants' participation in one or more of several conspiracies rather than in the single conspiracy alleged. Appellants argue correctly that as a general rule, the jury decides whether one conspiracy or several existed, *United States v. Becker*, 569 F.2d 951, 961 (5th Cir.), *cert. denied*, 439 U.S. 865, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978). Whether the jury should ever reach that question, however, is for the trial judge's determination. As previously stated, the judge in this case correctly concluded that both the indictment and the proof at trial revealed but a single scheme. Absent a variance between the two, he need not have charged the jury on multiple conspiracies. *See United States v. Elliott*, 571 F.2d 880, 905-06 (5th Cir.), *cert. denied*, 439 U.S. 953, 99

S.Ct. 349, 58 L.Ed.2d 344 (1978); *United States v. Ashley*, 555 F.2d 462, 467-68 (5th Cir.), *cert. denied*, 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977).

VI. Prosecutor's Closing Argument

[16] Finally, appellant Metz claims that the prosecutor's closing argument brought about the guilty verdict through prejudicial appeals to the jury unsupported by the evidence. Metz cites as examples the prosecutor's characterization of Metz and other defendants as "dope pushers," his reference to the drug-related problems of a venireman, and his emphasis on the national scope of the drug problem and appellant's role in it. We do not find the cumulative effect of the prosecutor's persuasive efforts either unduly prejudicial or excessively inflammatory. *See United States v. Soto*, 591 F.2d 1091, 1101 (5th Cir.), *cert. denied*, ____ U.S. ____, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979). The "dope pusher" characterization falls safely on the legal side of the line between improper expression of the prosecutor's opinion and entirely appropriate advocacy of conclusions to be drawn from the evidence. *See United States v. Siegel*, 587 F.2d 721, 727 (5th Cir. 1979). As we have remarked before, "[u]nflattering characterizations of a defendant do not require a new trial when such descriptions are supported by the evidence." *United States v. Malatesta*, 583 F.2d 748, 759 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). *See also United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974) (characterization as "fugitive" inflammatory when irrelevant and unsupported by any evidence).

CONCLUSION

Seventeen people were indicted in this complex conspiracy which ranged from California to the Caribbean. Trying such a complex case commands considerable effort from all involved. We are convinced that appellants received from these labors a fair trial commensurate with all constitutional standards and statutory mandates. Accordingly, their convictions are AFFIRMED.

HATCHETT, Circuit Judge, dissenting:

Because I do not believe the record shows probable cause for the search of the Metz residence, I dissent.

Supreme Court of the United States.

No. A-792.

WALTER METZ,
PETITIONER,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 14, 1980.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 17 day of March, 1980.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION.

CRIMINAL No. CR 3-78-62

UNITED STATES OF AMERICA,
PLAINTIFF,

vs. **Motion for Severance**

WALTER METZ, WANDA METZ, ET AL.,
DEFENDANTS.

The Defendants, WALTER METZ and WANDA METZ, by and through counsel, hereby move this Honorable Court, pursuant to Rule 14, Federal Rules of Criminal Procedure, and included authority, to sever the trial of their case from that of their co-defendant, RONALD D. SCHILLER, showing as reasons therefor as follows:

1. The Movants herein are prejudiced by their joinder in trial with co-defendant, Ronald D. Schiller. The Movants, and undersigned counsel, have determined upon due investigation and consultation with the co-defendant, Ronald D. Schiller (under the auspices of his counsel) that it is necessary and *essential* to call this co-defendant to the stand to testify as a witness on the behalf of WALTER METZ and WANDA METZ and in their defense.

2. The evidence sought to be elicited from Ronald D. Schiller is of great and substantial use to WANDA METZ and WALTER METZ in that the testimony of this co-defendant would actually be exculpatory with respect to them, as hereinafter shown; moreover, this co-defendant is *the only available* witness to Movants' knowledge who possesses the information which

Movants seek to elicit from him. Movants can rely upon no other witnesses, to counsel's knowledge, in order to establish what this co-defendant is able to testify to.

3. Without conceding or admitting to the truthfulness of any of the allegations contained in the Indictment, Movants do outline, herein and below, the nature of the testimony they seek to elicit from the co-defendant, Ronald D. Schiller. Moreover, this witness has indicated either personally, and through his counsel, that he would, *in fact*, testify as outlined below, assuming his testimony could not be used against him in the Government's prosecution of the charges in the within Indictment.

The below outline is made in earnest and for good cause, in good faith and solely to demonstrate that such testimony is *critically relevant and material* to the defense of WALTER METZ and WANDA METZ:

(a) The co-defendant, Ronald D. Schiller, can and will testify, contrary to the allegations in Count I of the within Indictment that:

(1) That he, Schiller, indeed had contact and conversations with numerous other named co-defendants, i.e., John William Bland, Shirley A. Ruggiero and William C. Ruggiero, on both December 13, and 14, 1977, respecting an anticipated cocaine transaction. Mr. Schiller would, in addition, testify that at no time during the above-described contacts or conversations were Mr. or Mrs. Metz present or referred to by him or others in any fashion, directly or indirectly.

(2) That he, Schiller, indeed, had contacts and conversations with drug enforcement agents working in an undercover capacity, to-wit: Agent House, Agent Clayton, and Agent O'Leary, on both December 13, and 14, 1977, respecting an anticipated cocaine transaction. Mr. Schiller would, in addition, testify that at no time during the above-described contacts or conversations were Mr. or Mrs. Metz present or referred to by him or others in any fashion.

(3) Although co-defendant Schiller had made the acquaintance of Mr. and Mrs. Metz, particularly Mrs. Metz, prior to December 14, 1977, and although he, indeed, did visit the premises located at 7145 W. Second Way, Hialeah, Florida, on three occasions during the afternoon of December 14, 1977, he, Schiller, at no time during the days of December 13th or 14th had contact in any fashion, either in person, by phone, or otherwise with either WALTER METZ or WANDA METZ.

(4) Neither WALTER METZ nor WANDA METZ conspired or agreed with he, Schiller, or with any other persons to the knowledge of the co-defendant, Schiller, either expressly or tacitly to possess or distribute cocaine; nor did either WALTER METZ or WANDA METZ, ever knowingly or willfully conduct themselves in a manner designed to accomplish the above.

(5) Co-defendant, Schiller, can and would testify to the specific circumstances surrounding his visits to 7145 W. Second Way, Hialeah, Florida, during the afternoon of December 14, 1977, and its ultimate use by him on that day; both of which circumstances and use in nowise contemplated, *or in fact*, involved the participation of WALTER METZ or WANDA METZ in any criminal conduct, in any fashion.

(6) Co-defendant, Schiller, can and will testify that neither WALTER METZ or WANDA METZ had knowledge of or use, dominion or control over, any contraband that was at anytime in the control of the co-defendant, Schiller, during December 14, 1977.

(7) Co-defendant, Schiller, can and will testify as to the circumstances surrounding his activities on the 14th of December, 1977, including the "how" and "why" Schiller came to be present at different times at a residence located at 7145 W. Second Way, Hialeah, Florida, including the "how" and "why" certain contraband "ended up" on those premises; all of which circumstances will, in fact, be shown to be inconsistent with any prior knowledge on the part of either of the co-

fendants, WALTER METZ or WANDA METZ, to ever allow contraband to remain there. Indeed, Schiller's testimony would show specifically why he went to those premises, the contacts he had there, including his activities with the residence and that the amount of contraband ultimately found on the premises was merely coincidental and fortuitous, in that at no time did either of the co-defendants, WALTER METZ or WANDA METZ, intend the happenings of any of the above facts, nor aid or assist Schiller or the other criminal participants in the happenings of the above facts.

(8) Co-defendant, Schiller, can and will testify that neither of the co-defendants, WALTER METZ or WANDA METZ, at anytime either knowingly or willfully possessed any cocaine with an intent to distribute it, nor did they ever intend to assist Schiller or others in so doing.

(b) Indeed, Schiller's testimony would explain in a completely and totally exculpatory manner as to both WALTER METZ and WANDA METZ, the extent and scope of his, i.e., Schiller's, relationship to Mr. and Mrs. Metz; how he, Schiller, came to be present on the premises located at 7145 W. Second Way, Hialeah, Florida, at different times on December 14, 1977, as well as the why and how WALTER METZ and WANDA METZ could not have had any prior knowledge of, or part in, any agreement or conspiracy to distribute cocaine or be in any willful possession thereof with an intent to distribute. In essence, Schiller's testimony would reflect his participation in a criminal conspiracy with others involving the incidental use of the premises located at 7145 W. Second Way, Hialeah, Florida, without any knowledge of Schiller's activities by Mr. or Mrs. Metz. Indeed, Schiller's testimony would indicate that he never spoke to or saw either Mr. or Mrs. Metz on December 14, 1977.

4. The within Motion is filed in good faith at this time because:

(a) Undersigned counsel only recently (candidly, in response to the Court's unexpected negative rulings on Thursday, August 24, 1978) found it imperative to confer on a specific basis in this regard with Ronald Schiller and his counsel, Van Stillman. Specifically, the conferences referred to occurred on Saturday and Sunday, the 26th and 27th of August, 1978, in Miami. Insofar as the timing of these conferences is concerned, the Court should be aware that such matters (wherein the co-defendant, Schiller, is virtually confessing guilt) are sensitive in a nature and not normally the subject of inter-counsel conferences except for imperative circumstances. Candidly, undersigned counsel, at no time until the rulings on Thursday, August 24, 1978, had reason to believe that there would be the necessity for an actual trial as to Mr. and Mrs. Metz and did not feel it appropriate or ripe to confront co-defendant, Schiller, and his counsel with a request for testimony. Obviously, upon receiving the negative rulings from the Court, undersigned counsel immediately scheduled an appointment in Miami over the weekend to discuss with co-defendant, Schiller, and his counsel, what Mr. Schiller would testify to and the circumstances under which the testimony would be available to Mr. and Mrs. Metz. Indeed, it is the result of the recent conferences that undersigned counsel for the first time was able to particularize the matters referred to in Paragraph #3 above.

(b) Specifically, undersigned counsel, for the first time on Saturday, August 26, 1978, received the assurance from both Mr. Schiller and his counsel, Van Stillman that:

(1) Ronald Schiller under no circumstances is going to testify at his own trial.

(2) Ronald Schiller, if called as a witness by either Mr. or Mrs. Metz, would definitely and positively invoke his priviledge under the Fifth Amendment and refuse to testify because he, understandably, refuses to be a witness against himself in this cause.

(3) Ronald Schiller has stated to the undersigned and to Van Stillman, Esq., his counsel, that WALTER METZ and WANDA METZ are totally and completely innocent of the charges made in the within Indictment and, notwithstanding the outcome of his own trial, and in spite of any appeal rights he has in the event of a conviction, he will, *in fact*, testify at a subsequent trial of Mr. and Mrs. Metz conducted at the conclusion of his own trial. Further, Mr. Schiller has explained to undersigned counsel and to his counsel, Van Stillman, that while he wants a fair trial for himself and will not testify in his own defense, he will not stand by and allow WALTER METZ or WANDA METZ to have to proceed to trial without his exculpatory testimony (as highlighted in Paragraph #3 above) even though if he were convicted and his conviction was ultimately reversed, his testimony could, on re-trial, be used against him.

5. Co-defendants, Schiller, from the face of the Indictment, from the considerable testimony presented at the hearings during the week of August 21, 1978, and, indeed, from Mr. Schiller's own observations (refer to Paragraph #3 above), is the obvious focal participant in this Indictment (particularly as it relates to a conspiracy involving Mr. and Mrs. Metz) and his testimony is of absolute and critical importance to WALTER METZ and WANDA METZ. Mr. Schiller is the only witness who can flatly and directly contradict the weight of the circumstantial evidence to be presented in support of the conspiracy charge against WALTER METZ and WANDA METZ, and as can be gleaned from all of the above, Schiller is in a peculiar and unique posture to know and to testify that neither WALTER METZ or WANDA METZ were at anytime acting in concert or agreement with Schiller during the course of his illegal activities. In fact, it should be clear that this testimony is available and known only to Ronald Schiller and such testimony could, therefore, not be acquired and presented by any other person known to undersigned counsel but the co-defendant, Ronald Schiller.

WHEREFORE, and respectfully, defendants, WALTER METZ and WANDA METZ, pray that this Honorable Court will enter an order severing their trial from that of their co-defendant, Ronald Schiller.

Respectfully submitted,

MORAN & GOLD, P.A.
950 South Miami Avenue
Miami, Florida 33130

/s/ WILLIAM M. MORAN
Attorney for Defs., Walter Metz
and Wanda Metz

I HEREBY CERTIFY that a copy hereof was hand delivered this 28th day of August, 1978, in open court, in Dallas, Texas, to JAMES A. ROLFE, Esq., Assistant U.S. Attorney; and to L. VAN STILLMAN, Esq., counsel for Def., Schiller.

/s/ WILLIAM M. MORAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION.

UNITED STATES OF AMERICA

v. No. CR-78-62

RONALD D. SCHILLER, SHIRLEY A. RUGGIERO, WALTER METZ, WANDA METZ AND ARTIE CHRISTIE

ORDER

Defendants Walter Metz and Artie Christie have each filed motions to sever pursuant to Federal Rules of Criminal Procedure 14. After considering these motions in light of the applicable standards mandated in *Byrd v. Wainwright*, 428 F.2d 1017 (1970),[1] the motions are denied.

In essence, defendants allege that severances are proper as to each in order to gain the benefit of co-defendants' exculpatory testimony otherwise denied them in a joint trial.

Affidavits have been supplied by co-defendants as to willingness to testify for Metz and for Christie at a subsequent trial for each. Indeed, Walter Metz, who himself moves for severance and seeks a later trial for himself, joins the group of co-defendants willing to testify for Artie Christie, thus raising the spectre of three separate trials rather than the joint trial presently before this Court.

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[1] In *U.S. v. Martinez*, 486 F.2d 15, 22 (5th Cir. 1973), the criteria of Rule 14 were found to be similar to those required in *Byrd* by the Fourteenth Amendment's due process guarantee.

In making a Rule 14 determination, considerations of judicial economy are ones to which the trial court must pay "close attention". *United States v. Rice*, 550 F. 2d 1364, 1369 (1977). Moreover, the general rule in this circuit is that persons jointly indicted should be jointly tried, especially in conspiracy cases. *U.S. v. Evans*, 526 F.2d 701, 708 (5th Cir. 1976). I find that duplication of witnesses and evidence in this conspiracy case argues against severance.

The rule further requires that additional factors be considered, however. Accordingly, I have examined the significance of the desired exculpatory testimony to the defendants' defense, as well as the extent to which the defendants might be prejudiced by the absence of the testimony. I find that defendants would not be so prejudiced by remaining in joint trial as to deny them their right to a fair trial.[2]

The credibility and weight of the potential testimony of the co-defendants have been noted in making my assessment. The potential testimony proferred [*sic*] by Schiller to both Metz and Christie appears to have no adverse personal effect. This circuit noted in *U.S. v. Alejandro*, 527 F.2d 423, 428 (1976) that the proposed exculpatory testimony by a similarly situated defendant "cost him nothing. It is not unusual under such circumstances [where caught 'red-handed'], for the obviously guilty defendant to try to assume the entire guilt."

In connection with credibility determinations as to Mr. and Mrs. Metz' offers to testify, I note that the co-defendants could have presented exculpatory statements in favor of Metz and Christie at the pre-trial suppression and *James* hearing. Wanda Metz in fact did testify, but did not offer the testimony in

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[2] The defendants have no right to offer every desired evidence, *Byrd*, supra at 1021; similarly, this circuit recognized in *United States* v. *Cravero*, 545 F.2d 406, 412 (5th Cir. 1976), the likelihood that a separate trial might offer defendants a strategic advantage over a joint trial is not enough to demonstrate the unfairness of the joint trial.

favor of Artie Christie that is sought as the justification for severance.

For the above reasons, the motions to sever requested by defendants Walter Metz and Artie Christie are hereby denied.

It is so ORDERED.

[signature illegible]
United States District Court.

Date August 30, 1978

Supreme Court, U. S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1611

In the Supreme Court of the United States

OCTOBER TERM, 1979

WALTER METZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1979

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WALTER METZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by the district court's refusal (a) to sever a co-defendant who purportedly would have given exculpatory testimony for petitioner at a separate trial, and (b) either to compel a second co-defendant to testify over a claim of Fifth Amendment privilege or to admit that co-defendant's prior out-of-court statement.

2. Whether evidence against petitioner was obtained by means of an unconstitutional search.

I

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) is reported at 608 F.2d 147.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1979. A petition for rehearing was denied on February 14, 1980. 618 F.2d 315 (1980) (table). On March 17, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to April 14, 1980 (Pet. App. 23a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846. He was sentenced to 12 years' imprisonment to be followed by a three-year term of special parole.[1] The court of appeals affirmed (Pet. App. 1a–22a).

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[1] Petitioner has not challenged the validity of his special parole term. However, in light of this Court's recent decision in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), this aspect of petitioner's sentence was unauthorized and is subject to correction in the district court.

1. The evidence at trial showed that undercover agents of the Drug Enforcement Administration, posing as large-scale narcotics dealers, made arrangements to purchase cocaine from co-defendants Harold Oldham and Paul Hodgson (Tr. 23, 27, 534–537).[2] After extensive negotiations and a small preliminary transaction, an agreement was reached in Dallas on December 11, 1977, for the agents to buy 40 pounds of cocaine in exchange for $850,000. Hodgson stated to the agents that his source in Miami, where the transaction was to occur, sold an average of 100 kilos of cocaine a month and had 60 pounds of cocaine available (Tr. 27–30, 540, 543–545, 677).

The next day, the agents flew to Miami as agreed. They then arranged with Oldham to plan the details of the transaction the following evening. At the appointed time, the agents arrived to meet with Oldham, who was accompanied by co-defendants John Bland and Shirley Ruggiero (Tr. 30, 35–36). Ruggiero offered to sell the agents five pounds of cocaine that she said was at her house, but, when the agents declined, she said that the cocaine would have to be returned to the "stash pad" (Tr. 66, 649–650).

On December 14, 1977, the agents met with co-defendants Oldham, Bland, Ruggiero, and Ronald Schiller, who was introduced to them as the source (Tr. 50–51, 70, 84, 652). Initially, Ruggiero stated that there would be a brief delay in the transaction because they were unable to get into the "stash pad" at that hour of the morning (Tr. 41, 71, 653). A short time

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[2] "Tr." refers to the transcript of petitioner's trial.

later, after inspecting the agents' money, Schiller said that he was going to the "stash pad" to get the 40 pounds of cocaine (Tr. 43, 113–115). Schiller then drove Ruggiero to her residence (Tr. 133–134) and proceeded to petitioner's house (Tr. 122, 134, 136, 142, 446). While Schiller was en route to petitioner's house, the agents called Ruggiero as planned (Tr. 44) and were told that Schiller was on his way to the "stash pad" (Tr. 72, 655). Approximately 30 minutes later (at a time when Schiller was seen entering petitioner's residence (Tr. 727)), the agents again spoke with Ruggiero and were informed that Schiller was at the "stash pad" (Tr. 72, 656). In addition, a green Lincoln Continental (which was not the car driven by Schiller) was observed parked in front of petitioner's house (Tr. 727–728).

Schiller picked up Ruggiero and met the agents at about 4:00 p.m. He brought with him a pound of cocaine and told the agents that, if they were satisfied with it, he would bring another four pounds and complete the deal in five-pound increments (Tr. 76–77). The agents replied that they wanted to purchase the 40 pounds in one lot (Tr. 77). Schiller said that he was not sure that his "connection" would be agreeable but that he would return to the "stash pad" and try to get the entire amount (Tr. 78, 123). Accompanied by Bland, Ruggiero, and Ruggiero's son, co-defendant Willie Ruggiero, Schiller returned to petitioner's residence (Tr. 124, 144, 218–220, 301–302, 757–758, 795), where petitioner met him at the door (Tr. 796, 799). At that time, the green Lincoln Continental was again seen at petitioner's house (Tr. 758).

After further negotiations, the agents agreed to make an initial purchase of one pound of cocaine (Tr. 79–80, 663–664). Schiller then returned to petitioner's residence a third time and stayed for an hour and fifteen minutes (Tr. 223–224, 301, 760, 800). The green Lincoln Continental was still parked in front of petitioner's house (Tr. 760). Thereafter, Bland telephoned the agents to report that Schiller had the five pounds of cocaine. A few hours later, Bland brought the agents a pound of cocaine, which they accepted but said they would withhold payment until they received the additional four pounds (Tr. 79–80, 665–666). Bland then rejoined Schiller and the Ruggieros and placed several telephone calls from a pay phone (Tr. 734–735, 762–764, 801). At 8:30 p.m., as the group was heading back to meet the agents, they were stopped and arrested (Tr. 735, 764–765, 801). Oldham was arrested approximately an hour later (Tr. 361–362).

2. After Schiller, Bland, the Ruggieros, and Oldham were arrested, the agents met at the DEA office to collect and consider the information they had gathered (Tr. 266–267, 394–395, 404–405). They decided to obtain a warrant to search petitioner's residence, and an Assistant United States Attorney was contacted to help prepare the warrant application (Tr. 266, 395). In the meantime, two agents were directed to resume surveillance of petitioner's house pending issuance of the warrant (Tr. 225, 395). At approximately 10:45 p.m., petitioner's wife and a young man were observed to leave the house and drive away. The agents stopped them for brief questioning and also searched their vehicle (Tr. 229–231, 235, 766–767). At this point, the

agents at the DEA office decided that it would be necessary to secure petitioner's house until the search warrant was issued (Tr. 314). An agent told this to petitioner's wife and asked her cooperation in order to minimize the disturbance or physical risk when they entered the house (Tr. 314–315, 356–357). When she proved uncooperative, she was informed that entry to secure the house would be undertaken despite her protests (Tr. 364). Mrs. Metz was then placed in custody to be taken to the DEA office. While en route, she inquired whether other agents would enter the house in her absence and, upon receiving an affirmative reply, stated that she had changed her mind and would admit the agents into the house in order to keep the matter from the attention of the neighbors (Tr. 317–318, 832).

Meanwhile, agents engaged in surveillance at petitioner's house saw petitioner drive off in the green Lincoln Continental shortly after 11:30 p.m. A few minutes later, petitioner returned, parked the car, and went into the house (Tr. 249–252, 768–769).

At approximately midnight, several agents entered petitioner's house (Tr. 366, 368, 769). As they approached the door, the agent in charge of the group took the keys from petitioner's wife (Tr. 319).[3] When he attempted to unlock the door, petitioner's wife shouted, "[i]t's me, and I am with the police. I have the police with me." At that point, the agent opened

[3]The agent refused the request of petitioner's wife that he return the keys, determining that it was necessary for him personally to open the door in order to effect the safest possible entry into the house (Tr. 319-320).

the door and observed petitioner standing in the doorway (Tr. 321). Petitioner's wife then remarked to petitioner, "Hal, are you still here? I thought you would have left by now" (Tr. 835). Petitioner ordered the agents to leave if they did not have a warrant, but they explained to him that they were there to secure the house (Tr. 323–324). Several agents went upstairs to make certain that no one else was present (Tr. 325, 370–371, 841). No search for narcotics was conducted at that time (Tr. 325), but the agents seized a quantity of cocaine approximately the size of a golf ball that was in plain view (Tr. 327, 372, 841).[4] Petitioner and his wife were brought to DEA headquarters at approximately 2:00 a.m. (Tr. 377, 464).

A final copy of the affidavit in support of the application for a search warrant was completed about 2:00 a.m., and a DEA agent and an Assistant United States Attorney brought it to the home of the United States Magistrate at approximately 3:00 a.m. (Tr. 395). The magistrate, after being advised that petitioner's residence had already been secured (Tr. 409), signed the warrant at 3:30 a.m. (Tr. 396, 937) but added a handwritten proviso that it was to be executed only in the daytime (C.A. App. 198).[5] The agents at the house were advised that the warrant had been issued but that a search was not to be undertaken until daylight (Tr. 396, 937). The search was commenced at ap-

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[4]The agent in charge of the group securing the house testified that he also noticed a white powdery substance in plain view on top of the kitchen counter, but since the nature of the substance was not obvious to him, he decided not to make a seizure until the warrant was issued (Tr. 382).

[5]"C.A. App." refers to the appendix in the court of appeals.

proximately 7:00 a.m. (Tr. 397, 858, 937). Traces of cocaine and cocaine residue totalling 2.1 grams were found in the trap in the kitchen sink, on the kitchen counter, in the kitchen garbage can, in the garbage disposal, and in the bathtub drain and on the toilet seat in the upstairs bathroom. In addition, a heat sealer and tracing paper, which are commonly used in packaging cocaine, were discovered in the kitchen. Finally, the agents seized a roll of paper towels that were the same size, color, and design as the paper towel containing the cocaine that Bland had previously given to the agents (Tr. 283–287, 329–330, 846–856, 958–962).

ARGUMENT

1. Petitioner contends (Pet. 10–21) that his rights to a fair trial and to present a defense were violated by the district court's refusal (a) to grant a severance to permit co-defendant Schiller to testify on petitioner's behalf, and (b) either to compel Bland to testify despite his assertion of the privilege against self-incrimination or to admit into evidence Bland's prior out-of-court statement. These contentions are without merit.

a. Petitioner was scheduled to stand trial together with, *inter alia*, his wife and Schiller.[6] After the jury had been selected, and on the day that presentation of evidence was to commence, petitioner and his wife filed a motion under Fed. R. Crim. P. 14 to sever them from the trial so that they could call Schiller as a wit-

[6] Petitioner's wife was subsequently severed from the trial because of illness.

ness (Pet. App. 24a–30a). They alleged that Schiller, if tried first, would testify at their trial that he had been in contact with the other defendants and with the agents regarding an anticipated cocaine transaction, but that petitioner and his wife were neither present nor referred to by him or the others (*id.* at 25a); that, although he visited petitioner's residence three times on December 14, 1977, he did not contact petitioner or his wife on that or the preceding day (*id.* at 26a); and that petitioner and his wife were not knowingly and willfully a part of the conspiracy (*id.* at 26a–27a). They further alleged that Schiller would testify "to the specific circumstances surrounding his visits" to petitioner's residence and to "its ultimate use by him" on December 14, "including the 'how' and 'why' [he] came to be present at different times" at petitioner's residence and "the 'how' and 'why' certain contraband 'ended up' on those premises" (*id.* at 26a). Finally, they referred to Schiller's assurances that he would not testify in his own defense and would invoke his Fifth Amendment privilege if called to testify at a joint trial, but that he would testify for them at a subsequent trial even if his testimony might later be used against him in the event of a successful appeal and ensuing retrial (*id.* at 28a–29a).

The court of appeals correctly held (Pet. App. 15a–16a) that the district court did not abuse its discretion in denying this severance motion (*id.* at 31a–33a). See, *e.g.*, 1 C. Wright, *Federal Practice and Procedure: Criminal* § 225, at 458 (1969).[7] The indictment in this

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[7] A severance rests in the sound discretion of the district judge. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954);

case alleged a complex conspiracy involving 17 defendants. A severance would have required a substantial duplication of effort and thus, as the district court (Pet. App. 32a) and the court of appeals (*id.* at 16a) concluded, would have defeated the objective of judicial economy and efficiency.[8] This difficulty was exacerbated by the fact that petitioner improperly waited to seek a severance until after the trial had commenced (see Fed. R. Crim. P. 12(b)(5)), and his

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Notes of Advisory Committee on Fed. R. Crim. P. 14 ("severance * * * is entirely in the discretion of the court"); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 227, at 468 (1969) (severance of defendants properly joined "is addressed to the discretion of the trial court and a conviction will be reversed only if the refusal of the trial court to grant relief was a clear abuse of discretion"). Moreover, contrary to petitioner's contention (Pet. 15), *Davis* v. *Alaska*, 415 U.S. 308 (1974), does not require de novo appellate review where constitutional rights are asserted to be involved. In *Davis*, the trial court had limited the defendant's cross-examination of a key government witness on the basis of a state statute rather than in the exercise of its discretion. In these circumstances, this Court reversed the conviction on the ground that the statute had been unconstitutionally applied to infringe the defendant's right of confrontation.

[8] Indeed, since defendant Artie Christy had also requested a severance, it is likely that at least three separate trials would have resulted from the defendants' motions to sever.

Petitioner contends (Pet. 14 n.9) that innovative procedures, such as simultaneous but separate juries, could be used to protect the interest of judicial economy. While these innovations might be within the discretion of the district court, it has never been thought that the defendant's right to a fair trial required such novel procedures as a matter of constitutional command. Moreover, we believe that petitioner has overlooked the many problems of implementation and fairness that might arise from these procedures. Cf. *United States* v. *Jackson*, 390 U.S. 570, 579-581 (1968).

explanation for this untimeliness—that he had not expected the district court to deny his pretrial motions to suppress evidence on Fourth Amendment grounds and to exclude co-conspirators' statements as hearsay (*id.* at 28a)—neither excused his dilatoriness nor compelled the district court to exercise its discretion in his favor. See, *e.g.*, *United States* v. *Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980).

Moreover, the courts below correctly determined (Pet. App. 15a, 32a) that Schiller's testimony had not been demonstrated to be sufficiently exculpatory that the denial of the severance would prejudice petitioner's substantial rights.[9] Schiller's proffered testimony was quite general and devoid of supporting facts. Furthermore, much of that testimony was insufficient to cast doubt on petitioner's guilt, since the government's case was not based on petitioner's role in the particular negotiations but rather rested on the use of his residence as the "stash pad." See *United States* v. *Abraham*, 541 F.2d 1234, 1239–1240 (7th Cir. 1976), cert. denied, 429 U.S. 1102 (1977). And with respect to that central issue, petitioner advanced only the vague assertion that Schiller would testify to the "how" and "why" the narcotics "ended up" in petitioner's residence (Pet. App. 26a). Thus, petitioner's motion "'merely hinted at the substance'" (*id.* at 15a) of Schiller's testimony and therefore was properly denied.[10]

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[9]We note that Artie Christy was acquitted at trial notwithstanding that his motion for a severance had been denied.

[10]The courts below also concluded that Schiller's proffered testimony had not been shown to be sufficiently exculpatory because it lacked credibility (Pet. App. 15a, 32a). As the district

b. Petitioner urges (Pet. 18–20) that co-defendant Bland, who had pleaded guilty prior to trial, was erroneously allowed to invoke his privilege against self-incrimination and should have been compelled to testify as a witness for petitioner.

Bland appeared at trial pursuant to a writ of habeas corpus *ad testificandum*. Examined outside the presence of the jury, Bland stated that he would not have appeared voluntarily (Tr. 984). After being advised by the court of his Fifth Amendment privilege not to incriminate himself (Tr. 984–985), Bland inquired whether he could answer some questions but assert the privilege with respect to others. When informed that he could not, Bland stated that he did not wish to take the stand (Tr. 989). He said that he did not know petitioner, that he would have no objection to testifying with respect to petitioner, and that he would not invoke the Fifth Amendment if asked whether he had contacted petitioner on December 14, 1977.[11] However, Bland explained that he would testify only if the questioning were restricted to petitioner and that he wanted neither to hurt the other defendants nor to commit perjury in regard to them (Tr. 991–993). The government also sought testimony from Bland (Tr. 995), and advised the court that as a practical

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court stated, his testimony would " 'cost him nothing. It is not unusual under such circumstances [where caught 'red-handed'], for the obviously guilty defendant to try to assume the entire guilt' " (*id.* at 32a (bracketed material in original), quoting *United States* v. *Alejandro*, 527 F.2d 423, 428 (5th Cir. 1976)).

[11] According to the representation of petitioner's counsel, Bland had said that he was never at petitioner's residence and had not spoken to or conspired with petitioner (Tr. 994).

matter Bland had immunity from further federal prosecution as a result of his guilty plea (Tr. 985–987). At the court's direction, the magistrate appointed an attorney to confer with Bland (Tr. 1050, 1053–1054).[12]

Appointed counsel, after speaking with the prosecutor, concluded that Bland had no federal self-incrimination problems, but advised Bland that he could validly assert his Fifth Amendment privilege because of the possibility of state prosecution (Tr. 1051). The district court agreed that Bland had a valid Fifth Amendment claim and declined to hold him in contempt (Tr. 1058).

The district court correctly sustained Bland's invocation of his Fifth Amendment privilege in light of the possibility of a state prosecution. See, *e.g.*, *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78–79 (1964). Moreover, contrary to petitioner's suggestion, Bland could not have given testimony favorable to petitioner without waiving this privilege. Once Bland testified that he did not know petitioner and had not been to petitioner's house on December 14, the prosecutor would have been entitled to test Bland's credibility and the significance of his testimony by cross-examining Bland on such matters as his involvement in the conspiracy and the basis and extent of his contact with the other co-conspirators—precisely the areas covered by the Fifth Amendment privilege that Bland was unwilling to waive. Cf. *Brown* v. *United States*, 356 U.S. 148, 154–156 (1958).[13]

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[12] Bland's retained counsel was then in Miami (Tr. 984).

[13] For example, at one point on December 14, 1977, Bland had made a call from a pay telephone to explain that the agents were

Nor is there any merit to petitioner's contention (Pet. 20–21) that the district court erred in excluding from evidence a sworn out-of-court statement that Bland had given to Schiller's counsel. In the statement (C.A. App. 140–163), which consisted of a transcribed question-and-answer session between Bland and the attorney in the attorney's office on August 11, 1978, Bland said that he had never met petitioner prior to their arrests in this case and that he had not been to petitioner's residence on December 14, 1977.

The district court (Tr. 1062–1063) and the court of appeals (Pet. App. 18a) correctly ruled that this statement failed to satisfy the specific provision of Fed. R. Evid. 804(b)(3) that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[14] Bland's statement was given in a nonadversarial setting in response to questions from the lawyer for co-defendant Schiller—circumstances that served to negate rather

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not trying to "rip off" the cocaine when they kept the one-pound package Bland had brought (Tr. 763). Beyond doubt, the prosecutor on cross-examination could explore the circumstances of this conversation, and in particular, the identity of the other party to the call. We also note that the Assistant United States Attorney correctly informed Bland at the trial that he would "be asked about Mr. Schiller and Mrs. Ruggiero" (Tr. 992).

[14]We also do not believe that this statement was contrary to Bland's penal interest since it did not tend to subject him to criminal liability. Of course, if Bland had taken the stand and testified to the same facts, he would have been subject to cross-examination that might have incriminated him (see pages 11–12, *supra*), but the contents of his out-of-court statement, standing alone, were not against Bland's penal interest.

than to corroborate the trustworthiness of the statement. Moreover, the corroboration requirement of Rule 804(b)(3) was especially significant in this case in light of the conflicts between Bland's statement and the evidence given by the government's witnesses at trial. Finally, neither Bland's reiteration of this statement—which was not subject to cross-examination or otherwise shown to be any more reliable than the original statement—nor the testimony of certain of petitioner's alibi witnesses that petitioner was not home on December 14—which was wholly immaterial to Bland's statement that he did not visit petitioner's house on December 14—furnished the requisite corroboration. Accordingly, the district court did not abuse its discretion in excluding Bland's hearsay statement under Fed. R. Evid. 804(b)(3).[15]

2. Petitioner claims that the seizure of cocaine and other items from his house was unlawful because there were neither exigent circumstances justifying the warrantless entry to secure the premises (Pet. 22–26) nor probable cause to justify the subsequent issuance of the search warrant (Pet. 26–27 n.17). These contentions are unavailing.

a. The court of appeals correctly held (Pet. App. 13a) that exigent circumstances justified the warrantless entry into petitioner's house to prevent the destruction of evidence until a warrant could be ob-

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[15] For the same reasons, the statement was also inadmissible under the residual hearsay exception of Fed. R. Evid. 804(b)(5), which requires "equivalent circumstantial guarantees of trustworthiness" to those provided in the specific hearsay exceptions enumerated in Rule 804(b).

tained.[16] Petitioner's confederates had been arrested between 8:30 p.m. and 9:30 p.m. on December 14 while actively engaged in an ongoing narcotics transaction (see page 4, *supra*). Little significant activity was observed at petitioner's residence until approximately 10:30 p.m. (Pet. App. 5a). At that point, petitioner's wife and a young man drove away from the house, and shortly thereafter petitioner also left the house and returned a few minutes later. The decision to seek a warrant had been made and the application for a warrant was being prepared, but unavoidably a few hours would pass before the warrant could be issued. In light of the ease with which narcotics can be concealed, moved, or destroyed, the agents had adequate grounds to secure the premises for the limited purpose of preventing the destruction of evidence pending issuance of a warrant.[17] See *United States* v. *Edwards*, 602 F.2d 458, 468–469 (1st Cir. 1979), and cases cited therein; *United States* v. *Picariello*, 568 F.2d 222, 226 (1st Cir. 1978); *United States* v. *Grummel*, 542 F.2d 789, 791 (9th Cir. 1976), cert. denied, 429 U.S. 1051 (1977); *United States* v. *McLaughlin*, 525 F.2d 517,

[16] That the purpose of the entry was to secure the premises pending issuance of the warrant, and not to conduct a warrantless search, is clearly demonstrated by the fact that no search in fact occurred until a warrant had been obtained. Indeed, while a warrantless plain-view seizure was made of an object that was recognized to be cocaine, no seizure was effected of another item in plain view that, although suspected to be cocaine, was not immediately recognized as such.

[17] In view of the fact that cocaine was found in such places as the kitchen sink, the kitchen garbage can, the garbage disposal, and the bathtub and toilet of the upstairs bathroom (see page 7, *supra*), the agents' concern about possible destruction of evidence proved to be well-founded.

520–521 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976).[18]

Petitioner contends that the agents might justifiably have entered the premises at an earlier time than they actually did and therefore that the warrantless entry was not supported by exigent circumstances. In the end, petitioner simply disagrees with the agents' tactical decision to attempt to minimize the disruption and risk of entering by seeking to gain the cooperation of petitioner's wife.[19] That the agents acted with restraint and caution does not contradict the continued existence of exigent circumstances and affords no basis to invalidate the warrantless entry made while the warrant application was being prepared.[20]

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[18]Contrary to petitioner's contention (Pet. 25-26), the decision below does not conflict with *United States* v. *Robertson*, 606 F.2d 853 (9th Cir. 1979). Unlike the situation in this case, where the purpose of the entry was confined to securing the premises until a warrant could be obtained, the purpose of the entry in *Robertson* was to make an arrest without obtaining a warrant. See 606 F.2d at 856. Moreover, as the *Robertson* court pointed out, the police in that case had the house under surveillance for two hours while awaiting the arrival of the agent who took charge of the entry, and during this period "they may have passed up a reasonable opportunity to have obtained a warrant." *Id.* at 859. Here, on the other hand, the process of obtaining a warrant was underway before and during the time that the residence was entered and secured, and the warrantless entry was not used by the agents in lieu of procuring a warrant.

[19]Petitioner submits, without any citation of support (Pet. 24 n.15), that the agents stopped his wife solely in an effort to substantiate their suspicion that his house was the "stash pad." This assertion is insubstantial. As discussed below, the agents at that point had sufficient information to establish probable cause, and a successful application for a warrant based on that information was already being prepared.

[20]Nor is the existence of exigent circumstances negated, as petitioner contends (Pet. 23), by the fact that the magistrate did

b. Lastly, petitioner briefly contends (Pet. 26–27 n.17) that the agents did not have probable cause to support the issuance of the warrant.[21]

The record amply demonstrates, however, that the agents had probable cause to believe that cocaine was being stored at petitioner's house. On two occasions, they were informed that Schiller was going to the "stash pad," and in both instances Schiller was then observed going to and entering petitioner's house (see page 3, *supra*). Moreover, cocaine was twice delivered to the agents shortly after Schiller had gone to petitioner's residence (pages 3–4, *supra*). Especially in light of Shirley Ruggiero's statements to the agents that the cocaine at her house would have to be returned to the "stash pad" (see page 2, *supra*) and that Schiller was on his way to the stash pad at a time when he had already left her house (*ibid.*), the agents had adequate grounds to conclude that petitioner's residence was serving as the "stash pad."[22] And, notwithstanding petitioner's intimation (Pet. 27 n.17), the

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not authorize nighttime execution of the warrant. Contrary to his assertion (*id.* at n.14), the record shows that the magistrate was informed that the residence had been secured (see page 6, *supra*); in those circumstances, there was no necessity to authorize nighttime execution.

[21] Judge Hatchett, in a one-sentence opinion, dissented in the court of appeals on this issue of probable cause (Pet. App. 22a).

[22] *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), upon which petitioner relies (Pet. 27 n.17), does not conflict with the decision below. In contrast to the instant case (C.A. App. 199), the application in support of the warrant in *Taylor* was held invalid because it failed to state that the suspects had been seen entering the house that was to be searched (599 F.2d at 836).

prior negotiations for the sale of 40 pounds of cocaine established a sufficient likelihood that additional cocaine (as well as evidence concerning the one pound of cocaine that had already been delivered) would be found at petitioner's house.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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